CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930 1931

No. 589 36

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A COPARTNERSHIP, PETITIONERS,

vs.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1930

CERTIORARI GRANTED MARCH 3, 1930

(34,720)

(34,720)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1930

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Names and Addresses of Attorneys

For Appellant:

Samuel W. McNabb,
United States Attorney,

Emmett E. Doherty,
Assistant United States Attorney,

Federal Building,
Los Angeles, California.

For Appellees:

Dan J. Chapin,

I. W. Hellman Building,

Los Angeles, California.

CITATION

United States of America—ss.

To R. E. GRAHAM and E. E. FOSTER, co-partners, doing business under the firm name and style of MILLIE-FRANCIS OIL COMPANY, a co-partnership, and DAN J. CHAPIN, their Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 1st day of May, A. D. 1929, pursuant to an Order Allowing Appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled

and you are to show cause, if any there be, why the judgment rendered in the said action above mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable EDWARD J. HENNING, United States District Judge for the Southern District of California, this 2nd day of April, A. D. 1929, and of the Independence of the United States, the one hundred and fifty-third.

"Edward J. Henning,"
U. S. District Judge for the Southern Distrct of California.

(Endorsed): Filed Apr 4 1929 R. S. Zimmerman, Clerk By W. L. Gaines Deputy Clerk. Received copy of this citation on this 4" day of April 1929. Dan J. Chapin.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

COMPLAINT

Action at Law
No. 3009-H

R. E. Graham and E. E. Foster, Co-partners, doing business under the firm name and style of Millie-Francis Oil Company, a co-partnership,

Plaintiffs,

vs.

Rex B. Goodcell, former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Defendant.

Come now the plaintiffs above named and for cause of action against the defendant herein, complain and allege:

I.

That said plaintiffs, R. E. GRAHAM and E. E. FOSTER, now are and at all times herein mentioned were residents of the State of California, and during all such times were engaged in business as co-partners under the firm name and style of MILLIE-FRANCIS OIL COMPANY;

II.

That said defendant, REX B. GOODCELL, at the time the payment hereinafter alleged was made was the duly appointed, qualified, and acting Collector of Inter-

nal Revenue of the United States of America, in and for the Sixth Collection District, and during all such time was acting in his official capacity as such officer;

III.

That the claim involved in this action, exclusive of costs and interest, amounts to the sum of $9,039.40, together with interest thereon from the 3rd day of December, 1924, at the rate of six per centum (6%) per annum, and this Court has jurisdiction of the parties and the subject matter of this action;

IV.

That said plaintiffs, R. E. GRAHAM and E. E. FOSTER, as such co-partners under the firm name and style of MILLIE-FRANCIS OIL COMPANY, a co-partnership, on or before the 15th day of March, 1918, made a return of tax liability to the Collector of Internal Revenue of the United States of America, under and pursuant to the laws of the United States of America, in and for that district in which the city and county of Los Angeles, California, are situated, for the calendar year of 1917, and pursuant to such return paid or discharge the tax liability so determined to be due and owing to the United States of America under its laws for income and excess profit taxes;

V.

That the time within which the said assessment for the said year of 1917 could be made was not extended by mutual agreement or otherwise, nor was the said time

extended by the said Collector or any agency or officer of the United States Government in any manner whatsoever;

VI.

That thereafter and on or about the 19th day of November, 1924, the Commissioner of Internal Revenue of the United States of America made, levied, and assessed additional income and excess-profit taxes upon and against said plaintiffs for the said calendar year of 1917 in the sum of $7,034.71, together with interest thereon in the sum of $2,004.69, amounting in the aggregate to the sum of $9,039.40, and thereafter and upon the 25th day of November, 1924, the said Collector of Internal Revenue made demand upon plaintiffs for the payment thereof and pursuant to such demand in his said official capacity threatened to enforce and compel payment of the same, together with additional penalties, by proceedings of distraint under the laws of the United States of America, as in such case made and provided;

VII.

That said plaintiffs, in order to prevent said proceedings of distraint being instituted and to avoid threatened seizure of the property of plaintiffs in satisfaction and payment of said taxes thereunder and under duress and in fear of the institution of such proceedings, did, under protest pay to said Collector of Internal Revenue the said sum of $9,039.40, making such payment in two instalments, to-wit: the sum of $2,039.40 upon the 29th day of November, 1924, and the sum of $7,000.00 upon the 3rd day of December, 1924;

VIII.

That thereafter and on or about the 25th day of September, 1925, said plaintiffs herein made, served, and filed upon said Collector of Internal Revenue a claim for refund of the said sum of money exacted and paid as aforesaid upon the ground and for the reason that the same was illegally, wrongfully, and erroneously assessed, levied, and collected in that Section 250 (d) of the Revenue Act of the United States of America of 1921 bars the collection of such taxes after the expiration of five years from and after the date upon which such return was filed, and was paid under protest and under threat and fear of the institution of proceedings of distraint, and that thereafter and upon the 13th day of January, 1926, the said claim of plaintiffs herein for said refund was rejected and denied;

IX.

That the said assessment, and the demand of and the collection by said Collector of Internal Revenue of said sum of money as taxes and interest thereon as aforesaid was void and illegal in that under and pursuant to the laws of the United States of America in such case made and provided, the collection by distraint or otherwise of any and all such income and excess profit taxes is barred by Section 250 (d) of the Revenue Act of 1921 of the United States of America after the expiration of five years from and after the date of the filing of the return for said year of 1917, and that the time within which the said taxes exacted as aforesaid could be legally collected by distraint or otherwise expired on or about the 1st day of March, 1923;

X.

That said sum of $9,039.40 has not been paid to said plaintiffs, nor any part thereof, or any interest thereon, and that the said sum, to-wit: $9,039.40, and the whole thereof, together with interest thereon from the 3rd day of December, 1924, at the rate of six per centum (6%) per annum is now wholly due, owing, and unpaid.

Wherefore, plaintiffs pray for judgment against said defendant as follows:

1. For the sum of $9,039.40, together with interest at the rate of six per centum (6%) per annum from the 3rd day of December, 1924, until paid;

2. For plaintiffs' costs and disbursements herein expended;

3. For such other and further relief as to the Court may seem proper.

Carl E. Cameron,
Thomas B. Irvine,
Attorneys for Plaintiffs.

State of California,
County of Los Angeles—ss.

Carl E. Cameron, being first duly sworn, on his oath deposes and says:

That he is one of the attorneys for the above-named plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes the same to be true; that he makes this verification on behalf of said plaintiffs because said plaintiffs are absent from the

County of Los Angeles, State of California, in which county affiant has his office.

Carl E. Cameron.

Subscribed and sworn to before me this 23rd day of December, 1927.

Ruth E. Allen,
Notary Public in and for the County of Los Angeles, State of California.

(Notarial Seal)

(Endorsed): Filed Dec 23 1927 R. S. Zimmerman, Clerk By L. J. Cordes Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

ANSWER.

Comes now the United States of America by Samuel W. McNabb, United States Attorney for the Southern District of California, and E. E. Doherty, Assistant United States Attorney for said District, and in answer to the Complaint on file herein, admits, denies and alleges as follows, to-wit:

I.

Denies that the plaintiffs R. E. Graham and E. E. Foster now are or at the times mentioned in the complaint residents of the State of California; and the defendant further denies that the said defendants were engaged in business as co-partners under the firm name and style of Millie-Francis Oil Company;

II.

Admits the allegations set forth in Paragraph II of the Complaint on file herein;

III.

Denies that the amount of claim involved in this action, exclusive of costs and interest amounts to the sum of Nine Thousand Thirty-nine and 40/100 Dollars ($9,039.40) or any other amount.

IV.

Having no knowledge of the allegations set forth in Paragraph IV of the Complaint on file herein, the defendant therefore denies upon information and belief that the plaintiffs R. E. Graham and E. E. Foster, were copartners under the firm name and style of Millie Francis Oil Company; defendant further denies that on or before the 15th day of March, 1918, the plaintiffs made a return of tax liability to the Collector of Internal Revenue of the United States of America under and pursuant to the laws of the United States of America in and for that district in which the City and County of Los Angeles, California, are situated, for the calendar year 1917, and pursuant to such return paid or discharge the tax liability so determined to be due and owing to the United States of America under its laws for the income and excess profits tax;

V.

Denies that the time within which the said assessment for the said year 1917 could be made was not extended by mutual agreement or otherwise;

VI.

Admits the allegations set forth in Paragraph VI of the Complaint on file herein;

VII.

Admits the allegations set forth in Paragraph VII of the complaint on file herein;

VIII.

Admits that on or about the 25th day of September, 1925, the plaintiffs made, served and filed upon the Collector of Internal Revenue a claim for refund of taxes upon grounds alleged in Paragraph VIII of the complaint on file herein.

IX.

Denies that the assessment, demand and collection by the Collector of Internal Revenue, of the money paid as taxes by the plaintiffs was void or illegal, and the defendant further denies that the collection of such sums alleged to have been paid as taxes in the complaint was barred by the Statute of Limitations of any of the Revenue Acts;

X.

Denies that the defendant is indebted to the plaintiff in the sum of Nine Thousand Thirty-nine and 40/100 Dollars ($9,039.40) or in any other sum whatsoever.

Wherefore, the defendant prays that the plaintiffs take nothing by this action and that costs be awarded the defendant.

Samuel W. McNabb
United States Attorney
Emmett E. Doherty
Assistant United States Attorney
Attorneys for Defendant

DATED: This 13th day of April, 1928.

(Endorsed): Filed Apr 13 1928 R. S. Zimmerman Clerk Edmund L Smith Deputy Clerk.

[Title of Court and Cause.]

No. 3009-H

STIPULATION

STIPULATION OF FACTS.

It is stipulated between Samuel W. McNabb, United States District Attorney, and Assistant United States District Attorney, Emmett E. Doherty, for said Southern District of California, attorneys for the defendant, and Dan J. Chapin, attorney for the plaintiffs:

First: That said plaintiffs, R. E. Graham and E. E. Foster now are and at all times mentioned in their complaint filed in the above entitled action, were residents of the State of California, and during all such times mentioned in said complaint, were engaged in business as co-partners under the firm name and style of Millie-Francis Oil Company:

Second: That Rex B. Goodcell, defendant herein, on November 29, 1924, and December 3, 1924, the dates on which the payments are alleged to have been made in plaintiffs' said complaint, was the Collector of Internal Revenue for the Sixth District of California, and during such time was acting in his official capacity as such officer:

Third: That the plaintiffs, R. E. Graham and E. E. Foster filed their partnership income and partnership excess profits tax returns for the year 1917, on March 22, 1918, and paid the taxes due thereunder:

Fourth: That the Commissioner of Internal Revenue for the United States made an assessment of additional taxes against the plaintiffs herein in the amount of $7034.71 on the January, 1920 List:

Fifth: That plaintiffs herein filed a claim for abatement of the amount of the taxes so assessed and added interest, with the defendant herein, February 11, 1920:

Sixth: That the Commissioner of Internal Revenue rejected said claim on December 27, 1922:

Seventh: That on November 19, 1924, the defendant herein served a Notice and Demand on the plaintiffs for the payment of said additional tax in the amount of $7034.71, together with interest in the sum of $2004.69, demanding from said plaintiffs the total amount of $9039.40, and the said defendant, in his official capacity threatened to enforce and compel payment of the taxes and interest by distraint and sale of plaintiffs' property:

Eighth: That said plaintiffs, to prevent the seizure and sale of their property to satisfy the payment of said tax and interest, did under duress and protest, pay to the defendant, then Collector of Internal Revenue, the said sum of $9039.40, making such payment in two installments, to-wit: the sum of $2039.40, on November 29, 1924, and the sum of $7000.00 on December 3, 1924:

Ninth: That plaintiffs filed with the defendant herein on September 25, 1925, a claim for refund of the said sum of money so exacted and paid by them upon the ground that the amount was illegally, wrongfully and erroneously collected, in that Section 250 (d) of the Revenue Act of the United States of America of 1921 bars the collection

of such taxes after the expiration of five years from and after the date upon which such returns were filed, and wherein payment had been made involuntarily. That said claim so filed was thereafter and upon January 13, 1926 rejected and denied by the Commissioner of Internal Revenue:

Tenth: That at the time the first installment of said taxes was collected by the defendant ($2039.40 on November 29, 1924), six years, eight months, and seven days had elapsed since plaintiffs filed their returns on March 22, 1918, and at the time the second installment was collected ($7000.00 on December 3, 1924), six years, eight months, and eleven days had elapsed since returns were filed by the plaintiffs:

Eleventh: That defendant has not refunded the said amount of $9039.40 or any part thereof to the plaintiffs:

Twelfth: That the plaintiffs at no time entered into any agreement with the Commissioner of Internal Revenue for an extension of the limitations provided by the statutes for the determination of the assessment or collection of the taxes so assessed in the above entitled action:

Thirteenth: That the returns filed on or about the 22nd day of March, 1918, were not false or fraudulent:

Fourteenth: That the five year period for the assessment and collection of the tax, i.e., five years from the date the returns were filed, as provided by Section

250 (d) Act of 1921, had expired long prior to the enactment of the Revenue Act of June 2, 1924.

.....

United States Attorney
Emmett E. Doherty,
Assistant U. S. Attorney
Attorneys for Defendant.
Dan J. Chapin
Attorney for Plaintiff

Dated this 20th day of September, 1928.

(Endorsed): Filed Sep 24 1928 R. S. Zimmerman Clerk By.....Deputy Clerk. Filed Sep 24 1928 R. S. Zimmerman Clerk By Francis E Cross Deputy Clerk.

[Title of Court and Cause.]

No. 3009-H

STIPULATION

It is hereby stipulated by and between plaintiffs and defendant in the above entitled action, through their respective counsel, that a jury trial in the above entitled cause may be and the same is hereby waived.

Dan J. Chapin
Attorneys for Plaintiffs
Samuel W. McNabb,
United States Attorney.
Emmett E. Doherty,
Assistant United States Attorney.

(Endorsed): Filed Jan 3 1929 R. S. Zimmerman Clerk By Frances E Cross Deputy Clerk

[Title of Court and Cause.]

No. 3009-H

FINDINGS AND JUDGMENT

December 28, 1928.

This cause came on to be heard at this time and upon consideration thereof, the Court made findings and judgments as follows:

FINDING OF FACTS

I.

That the only allegations of the complaint considered by the Court were those alleging that the statutes of limitation had run against the collection by distraint or otherwise of the taxes in question.

II.

That there is no issue of fact to be decided as the litigants filed a written stipulation of fact.

III.

That the only question to be decided is whether the statute of limitations had run against the collection of tax in question, and whether the defendant was barred from so collecting the tax and interest on November 29, 1924, in the amount of $2039.40, and on December 3rd, 1924, in the amount of $7000.00, making a total amount of taxes and interest paid on the respective dates of $9,039.40.

IV.

That if the taxes were collectible, the proper amount of tax was assessed and paid. A claim for refund duly made and rejected by the Commissioner of Internal Revenue and plaintiff duly notified.

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction of the parties of this suit and of the subject matter thereof.

II.

That the statutes of limitations began to run from the date plaintiffs filed their original return, to-wit: the 22nd day of March, 1918.

III.

That the assessment of $7034.71 was made in the month of November, 1924, to which was added interest in the sum of $2004.69, making a total amount paid of $9039.40; that the time within which said tax and interest might be collected by distraint had expired on March 22, 1923, long before the passage of the revenue Act of June 2, 1924, the collection so made being in no way effected by the extension of time to collect by distraint provided therein, and that on November 29, 1926, and on December 3, 1926, the dates of collection of said tax and interest was so made by warrant of distraint such collection was barred by the statute of limitation.

IV.

That plaintiff is entitled to recovery from the defendant the sum of $9039.40, with interest thereon from the 3rd day of December, 1924, until paid, and

It is hereby ordered that judgment be so entered for the plaintiffs.

DATED: This 23rd day of Jan., 1929.

Edward J. Henning,
United States Distr. Judge.

APPROVED as to form as provided in Rule 44

Emmett E. Doherty,
Attorney for Defendant.

(Endorsed): Filed Jan 3 1929 R S Zimmerman Clerk By Frances E Cross Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

JUDGMENT

The issues in this action having been duly brought to trial before Honorable Edward J. Henning, United States District Judge, on December 28, 1928, and the Court having heard the allegations and proofs of the parties, and after due deliberation having duly made its decision in writing in favor of the plaintiffs and against the defendant, with findings of fact and conclusions of law duly filed in the Clerk's office of said Court.

Now, on said decision it is ordered, adjudged and decreed that plaintiffs R. E. Graham and E. E. Foster,

co-partners doing business under the firm name and style of Millie-Francis Oil Company, a co-partnership, recovers of the defendant, Rex B. Goodcell, former Collector of Internal Revenue for the Sixth District of California, the sum of $9039.40 with interest thereon from the 3rd day of December, 1924.

Judgment signed and entered this 3 day of January, 1929, at.....o'clock.....M.

.....

Clerk.

APPROVED as to form as provided in rule 44.

Emmett E. Doherty,
Attorney for Defendant.

Judgment entered January 3rd 1929 R. S. Zimmerman Clerk By Frances E Cross Deputy Clerk

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At a stated term, to-wit: The July Term, A. D. 1928 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 28th day of December in the year of our Lord one thousand nine hundred and twenty-eight.

Present: The Honorable Edward J. Henning, District Judge.

No. 3009-H Civ.

R. E. Graham, et al., Plaintiffs,

vs.

Rex B. Goodcell, etc., Defendant.

Under date of September 24th, 1928, upon statement made by Emmett E. Doherty, Assistant United States Attorney, counsel for the Government, who filed Stipulation of Facts, the Court having ordered that this cause be submitted on said Stipulation of Facts, and on briefs to be filed 10 X 10 X 5, and the plaintiff having filed its opening brief on October 2nd, 1928, and the Government having filed no brief; and the Court having duly considered the Stipulation of Facts and plaintiff's brief; upon consideration whereof, the Court now orders that judgment be entered for the plaintiff.

[Title of Court and Cause.]

No. 3009-H.

ASSIGNMENT OF ERRORS

Comes now the defendant in the above entitled case and files the following assignment of errors, upon which the defendant will rely in his prosecution of the appeal in the above entitled case from the judgment entered in this cause by this Honorable Court on the 3rd day of January, 1929:

I.

That the United States District Court in and for the Southern District of California, Central Division, erred in ordering judgment for the plaintiff.

II.

That the United States District Court in and for the Southern District of California, Central Division, rendered a judgment contrary to the findings of fact;

III.

That the Court erred in rendering judgment for the plaintiff, as a matter of law.

Wherefore, appellant prays that said judgment be reversed and that said District Court of the United States for the Southern District of California, Central Division, be ordered to enter a judgment reversing the decision in said cause.

Samuel W. McNabb,
United States Attorney.
Emmett E. Doherty,
Emmett E. Doherty,
Asst. U. S. Attorney.

(Endorsed): Filed Apr 2 1929 R S Zimmerman Clerk Edmund L Smith Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

PETITION FOR APPEAL

To the Honorable Judge of the United States District Court for the Southern District of California, Central Division:

The above named defendant and appellant, feeling aggrieved by the judgment rendered and entered in the above entitled cause on the third day of January, 1929, does hereby appeal from the said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and defendant prays that this appeal be allowed and that citation as provided by law and that a transcript of the

record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court as in such cases made and provided.

And your petitioner further presents that the defendant, Rex B. Goodcell, former Collector of Internal Revenue of the United States, was sued in his official capacity as Collector of Internal Revenue for the United States for the Sixth Collection District of California and that under the existing laws an appeal bond ought not to be required.

Dated: this 2nd day of April, 1929.

Samuel W. McNabb,
United States Attorney,

Emmett E. Doherty,
Emmett E. Doherty,
Assistant United States Attorney.

(Endorsed): Filed Apr 2 1929 R. S. Zimmerman Clerk By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

ORDER ALLOWING APPEAL

Upon reading the petition for appeal of the defendant and appellant, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits.

stipulations and all proceedings be forthwith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

It is further ORDERED that the defendant and appellant be not required to deposit a supersedeas bond pending a determination of the issues involved in this appeal.

Dated: this 2nd day of April, 1929.

Edward J. Henning,
United States District Judge.

(Endorsed): Filed Apr 2 1929 R. S. Zimmerman, Clerk By Edmund L Smith Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

STIPULATION

It is hereby stipulated by the attorneys for the parties hereto that titles and captions be omitted and designated by lines marked title of court and cause and that the Clerk's filing endorsement only be included in the printed record in this case now on appeal before the United States Circuit Court of Appeals.

Dan J. Chapin,
Attorney for Plaintiffs,

Samuel W. McNabb,
United States Attorney,

Emmett E. Doherty,
Emmett E. Doherty,
Assistant United States Attorney.

Dated: this 24th day of May, 1929.
It is So Ordered.
Edward J. Henning,
United States District Judge.

(Endorsed): Filed May 24, 1929 R S Zimmerman Clerk W L Gaines Deputy Clerk

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[Title of Court and Cause.]

CLERK'S OFFICE

No. 3009-H

PRAECIPE

To the Clerk of said Court:
Sir:

Please prepare and certify copy of such papers filed and proceedings had in the above entitled action as are necessary to a determination of the cause on appeal and in particular as follows:

1. Complaint.
2. Answer to Complaint.
3. Stipulation of Facts.
4. Minute Order for Entry of Judgment.
5. Judgment.
6. Stipulation Waiving Jury Trial.
7. Findings of Fact and Conclusions of Law.
8. Assignment of Errors.
9. Petition for Appeal.
10. Order Allowing Appeal.
11. Citation on Appeal.
12. And this Praecipe.

DATED this 14th day of May, 1929.

Samuel W. McNabb,
United States Attorney,

Emmett E. Doherty,
Emmett E. Doherty,
Assistant United States Attorney.

(Endorsed): Filed May 14 1929 R S Zimmerman Clerk By Edmund L Smith Deputy Clerk

CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 24 pages, numbered from 1 to 24, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by Appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains full, true and correct copy of:

1. Complaint,
2. Answer to Complaint,
3. Stipulation of Facts,
4. Minute Order for Entry of Judgment,
5. Judgment,
6. Stipulation Waiving Jury Trial,
7. Findings of Fact and Conclusions of Law,
8. Assignment of Errors,
9. Petition for Appeal,
10. Order Allowing Appeal,
11. Citation,
12. Stipulation and Order for Diminution of Record, and
13. Praecipe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this

28th day of May, in the year of our Lord One Thousand nine hundred twenty-nine, and of our Independence the one hundred fifty-third.

(SEAL) R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

No. 5833

United States

Circuit Court of Appeals

For the Ninth Circuit.

R. E. GRAHAM and E. E. FOSTER, Copartners, Doing Business Under the Firm Name and Style of MILLIE-FRANCIS OIL COMPANY, a Co-partnership,

Appellees,

vs.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Appellant.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeal in above cause argued by Mr. Alva C. Baird, Special Attorney, Bureau of Internal Revenue, counsel for the appellant, and by Mr. Dan J. Chapin, counsel for the appellees, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of November, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich and Curtis D. Wilbur, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

WILBUR, Circuit Judge.—The question involved in this case is the proper interpretation of the word "stay" used in section 614 of the Revenue Act adopted in Congress in 1928 (45 Stat. 875; 26 U. S. C. A., section 2611). The appellees brought an action to recover $9,039.40 taxes they paid under duress to the appellant as Internal Revenue Commissioner on December 3, 1924, for the year 1917, after the five-year period of limitation had run. (26 U. S. C. A. 2607; 45 Stat. 874.) The appellees predicated their right to recover upon sections 3220 and 3226 of the Revised Statutes, and section 250 (d) of the Revenue Act of 1921 (42 Stat. L. 265), as constructed in Bowers vs. N. Y. & Albany Lighterage Co., 47 Sup. Ct. Rep. 389, 273 U. S. 346, and Russell et al. vs. United States, 278 U. S. 181. While the action was pending Congress enacted sections 607 and 611, *supra,* which prohibited a recovery where a claim in abatement had been filed and there had been a stay thereunder. The appellees filed a claim for abatement on February 11, 1920, which was rejected December 27, 1922. Most of the questions involved here were decided by this Court in Huntley vs. Gile, 32 Fed. (2d) 857, but in

that case it was stipulated that there had been a "stay." Here it is contended that the voluntary act of the collector in suspending or delaying the collection after appellee filed its claim for abatement was not a "stay" within the meaning of the statute. The view advanced is that to be a "stay" within the meaning of this statute there must have been a legal inhibition against the collection of the tax, or as it is said, a "legal" stay.

The word "stay," in its varying forms, has numerous definitions, and is applied to somewhat widely differing acts and things, with, however, the general underlying idea of the stoppage or suspension of movement. The following definitions seem pertinent:

Stay (used as a transitive verb, with the preterite and past participle stayed) is in Webster's New International Dictionary (1913) among other things defined as—

> "4. To hold from proceeding; to stop; check; restrain; also, to hinder; delay; detain; postpone; keep back; specif. to stop, or more usually suspend, the progress of by judicial proceedings or executive mandate" * * *

Stay (used as an intransitive verb, in same dictionary):

> "(From stay to hold up; from the idea of standing firm.)
>
> 1. To rest; depend; rely; stand * * *
>
> 2. To cease from any motion or course of action; specif.:

a. To come to an end; to cease; stop; as, that day the storm stayed. archaic.

b. To delay; wait; tarry; linger; as, stay and hear me. * * *

d. To stand still; not to retreat; to remain at a certain point or in a certain state."

In the Standard dictionary (1913), stay, used as a verb, is defined as follows:

"1. To stop the progress of; check; hold back; prevent; not now usually of physical motion; as to stay the ravages of a pestilence or pangs of hunger. * * *

3. To put off until a future time; postpone; hinder; suspend; as, to stay judgment."

The appellee is unable to point out any provision of law which would operate as a compulsory stay in a case where no bond is filed with the claim for abatement, and section 611, *supra*, expressly applies to a "stay" without bond. It is not claimed that any court, state or federal, is authorized to "stay" the collection of the tax. (R. S. 3224, 26 U. S. C. A., section 154.) Even if we were empowered to insert in the statute (section 2611, *supra*) the word "legal" before the word "stay," which we are not authorized to do by construction or otherwise, it would apparently cover a situation that cannot exist, and, therefore, be a useless addition. We see no reason why the word "stay" should not be given its usual significance, which in this case would be delay of executive action. The title of the section under consideration (sec-

tion 2611) can be referred to for the purpose of determining the proper interpretation of the section (Church of the Holy Trinity vs. U. S., 143 U. S. 457, 462). The title of this section is "Collections stayed by claim in abatement." Congress evidently intended to cover cases where actual delay had resulted from the filing of a claim in abatement. The idea of a legal or compulsory or involuntary stay is neither expressed nor implied. The language of the act is as apt to describe a voluntary delay by the collector to enable the claimant in good faith to secure a decision on his claim for abatement before the tax is collected as it is to describe an involuntary delay. The report of the committee of Congress on the bill states this definitely to be the purpose of the proposed enactment. That report is set forth in the opinion in Huntley vs. Gile, *supra*, and need not be repeated here. Our attention has been called to the decision of the Circuit Court of Appeals of the Fifth Circuit in a similar case, United States vs. Burden, Smith & Co., 33 Fed. (2d) 229. For the reasons we have stated we cannot follow that decision.

It is urged by the appellees that the case was not tried below upon the theory that section 2611, *supra*, was involved and that the appellant did not call the attention of the trial court to this section. It is true that the parties cannot change their theory of a case on appeal, but appellant's theory in the court below was that the stipulated facts were legally insufficient to justify a recovery and that is the point presented here. The point was presented in the

court below by motion for a judgment on the admitted facts. The circumstance that the District Court was not called upon to construe section 2611, *supra,* does not prevent a consideration on appeal of the objections and motions made and ruled upon in the trial court.

Judgment reversed.

[Endorsed]: Opinion. Filed Nov. 4, 1929. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5833.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Appellant,

vs.

R. E. GRAHAM and E. E. FOSTER, Copartners, Doing Business Under the Firm Name and Style of MILLIE-FRANCIS OIL COMPANY, a Copartnership,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the judgment of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Nov. 4, 1929. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-six (36) pages, numbered from and including 1 to and including 36, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 3d day of January, A. D. 1930.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2918)

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IN THE

Supreme Court of the United States

October Term, 1929.

No. 536

R. E. GRAHAM and E. E. FOSTER, Co-partners, Doing Business Under the Firm Name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

JOHN E. HUGHES,
Counsel for Petitioners.

U. S. Printing Company, 2817 N. Halsted St., Chicago, Ill.

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IN THE

Supreme Court of the United States

October Term, 1929.

No.....

R. E. GRAHAM and E. E. FOSTER, Co-partners, Doing Business Under the Firm Name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

PETITION.

JOHN E. HUGHES, in behalf of R. E. GRAHAM and E. E. FOSTER, co-partners, doing business under the firm name and style of MILLIE FRANCIS OIL COMPANY, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, for the

Ninth Circuit, entered in the above entitled case on November 4, 1929, reversing the judgment of the District Court for the Southern District, Central Division, of California, in the above case. The decision sought to be reviewed is reported in *35 F. (2d) 586.*

QUESTIONS PRESENTED.

1. What is the proper construction of *Section 611 of the Revenue Act of 1928?*

2. If *Section 611 of the Revenue Act of 1928,* which was enacted May 29, 1928, is retroactive and if it takes away a clear right of the taxpayer to recover a judgment against the respondent, which right existed at the time the petition and answer were filed and at the time the issues were joined in the case at bar, then does said Section deprive the taxpayer of proprty without due process of law and thus violate the Fifth Amendment to the Constitution of the United States?

STATEMENT.

It will be conceded that the respondent, by threats to seize and sell petitioners' property, compelled them to pay to him, under protest, additional income taxes for the year 1917 after their collection was barred by the Statute of Limitations, and it will also be conceded that at the time petitioners' complaint and respondent's answer were filed in the United States District Court the petitioners had a clear and undisputed right to recover a judgment against the respondent on the authority of the decision of this Court in the case of *Bowers v. New York & Albany Lighterage Co., 273 U. S. 346.*

The facts in the case were stipulated by the parties and the case was submitted to the District Court on that stipulation, which appears in the record at pages 11 to 14. The petitioners filed their partnership income and excess profits tax returns for the year 1917 on March 22, 1918, and paid the taxes due thereunder. On the January, 1920, list the Commissioner of Internal Revenue made an assessment of additional taxes against the petitioners in the amount of $7034.71. On February 11, 1920, the petitioners filed a claim for abatement of the amount of the additional taxes so assessed with interest thereon. The Commissioner of Internal Revenue rejected the said claim for abatement on December 27, 1922. The Statute of Limitations barred the respondent's right to collect the said taxes on March 22, 1923. *(Bowers v. New York & Albany Lighterage Co., 273 U. S. 346.)* On November 19, 1924, the respondent served a notice and demand on the petitioners for the payment of the said additional tax of $7034.71, together with interest in the sum of $2004.69, and in his official capacity threatened to enforce and compel the payment of said taxes and interest by distraint and sale of the petitioners' property. The petitioners, being prevented by statute from procuring an injunction to prevent the seizure and sale of their property, did, under duress and protest, pay to the respondent as Collector of Internal Revenue the said sum of $9039.40, making such payment in two installments, viz: the sum of $2039.40 on November 29, 1924, and the sum of $7000.00 on December 3, 1924. On September 25, 1925, petitioners duly filed a claim for the refund of the said sum of money upon the ground that the amount was illegally and wrongfully collected, in that *Section 250 (d) of the Revenue Act of 1921* barred the collection of it after the expiration of five years from the date upon

which petitioners' returns were filed. The said claim was rejected by the Commissioner of Internal Revenue on January 13, 1926. On December 23, 1927, petitioners filed their complaint in the District Court, seeking the recovery of said taxes and interest, on the ground that the same was collected from them under protest and duress and after the Statute of Limitations had barred the right to collect it. The respondent answered the complaint on April 13, 1928. The case was submitted to the Court on the written stipulation referred to and the Court in an unreported opinion gave judgment for the petitioners on January 3, 1929, which judgment was reversed by the Circuit Court of Appeals, for the Ninth Circuit, in *35 F. (2d) 586.*

STATUTES INVOLVED.

The statutes involved are *Sections 607 and 611 of the Revenue Act of 1928,* which was enacted May 29, 1928, and which are as follows:

> "Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.
>
> Sec. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part

thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court in the case at bar.

2. In failing to hold that *Section 611 of the Revenue Act of 1928* did not apply to the case at bar because it did not appear therein that the collection of the tax for the recovery of which the District Court had rendered judgment was stayed by the claim in abatement.

3. In holding that said *Section 611* was retroactive to the extent of depriving a taxpayer of the right to recover a judgment, which right clearly existed at the time said section was enacted.

4. In failing to hold that said *Section 611*, if construed to deprive a taxpayer of the right to a judgment which clearly existed at the time the wrong was done by the respondent and at the time the issue was joined in the District Court in the case at bar, deprived taxpayers of property without due process of law and was in violation of the Fifth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The decision in the present case is in conflict with the decision of the Circuit Court of Appeals, for the Fifth Circuit, in the case of *United States v. Burden, Smith &*

Co., 33 F. (2d) 229; and the opinion in the case at bar so concedes.

A great many cases are pending in the various District Courts which involve a proper construction of the foregoing sections, and the decisions of the District Courts are sharply in conflict. Decisions in the District Courts which are in conflict with the decision in the case at bar are: *Pepsin Syrup Company v. Schwaner, 35 F. (2d) 197 (Southern District of Illinois); Cutcheon v. Rafferty, 34 F. (2d) 708 (Eastern District of New York); Clinton Iron & Steel Co. v. Heiner, 30 F. (2d) 542 (Western District of Pennsylvania); Erie Coal & Coke Co. v. Heiner, 33 F. (2d) 135 (Western District of Pennsylvania); Bessemer Coal & Coke Co. v. Heiner,* decided November 8, 1929, *(Western District of Pennsylvania, No. 5642),* unreported to date; *The Sugerland Industries v. Bass,* decided November 12, 1929, *(Western District of Texas, No. 1157),* unreported to date; *The National Carton Co. v. Reinecke (Northern District of Illinois),* unreported to date.

The following decisions of the District Courts agree with the decision in the case at bar: *L. H. Woodward Co. v. Anderson, 34 F. (2d) 709 (Utah); Wright & Taylor v. Lucas, 34 F. (2d) 328 (Kentucky); Regla Coal Co. v. Bowers,* decided November 13, 1929 *(Southern District of New York, No. L-41-328).*

The Treasury Department in *General Counsel's Memorandum 5665,* published in *Cumulative Bulletin VIII-1, at page 130,* has held that the mere filing of a claim in abatement does not operate as a stay of the collection of taxes within the meaning of *Section 611,* and this holding

is apparently in conflict with the decision in the case at bar. And so is *G. C. M. 2757*, published in *C. B. VII-2, at p. 302*. Not only are there a very large number of cases pending in the various District Courts, but there are a large number of claims pending in the Treasury Department involving the proper construction of these sections and large sums of money are involved therein, and for these reasons it is thought that the Government will not oppose the granting of certiorari in the case at bar in order that the said sections may be finally construed and that the conflict of opinion between the Circuit Courts of Appeal and the various District Courts may be set at rest.

Wherefore, it is respectfully submitted that this petition should be granted.

JOHN E. HUGHES,
Counsel for Petitioners,
First National Bank Bldg.,
Chicago, Illinois.

January 18, 1930.

BRIEF IN SUPPORT OF PETITION

OPINION OF THE COURT

The opinion of the Court below is reported in *35 F. (2d) at page 586,* and was rendered November 4, 1929.

JURISDICTION

The jurisdiction of this Court is invoked under *Section 240 (a) of the Judicial Code* as amended by the Act of February 13, 1925.

ARGUMENT

Petitioners deem it unnecessary to repeat the argument of the United States Circuit Court of Appeals, for the Fifth Circuit, in the case of *Burden, Smith & Co., 33 F. (2d) 229,* or to repeat the arguments made by the various District Courts which have rendered opinions sustaining petitioners' contention. Attention is particularly called, however, to the opinion of the Court in the case of *Pepsin Syrup Company v. Schwaner, 35 F. (2d) 197.*

We desire briefly to direct the Court's attention to the following points:

1. *Section 607 of the Revenue Act of 1928,* by its express terms deals with taxes assessed prior to the enactment of the *Revenue Act of 1924,* which was enacted June 2, 1924. The suit in the case at bar is brought to recover taxes assessed for the year 1917. The *Revenue Act of 1917* did not contain any provision for the filing of a claim in abatement or for staying the collection of the tax upon the filing of such claim. The *Revenue Act*

of 1918, however, in *paragraph 14 of Section 234,* contained a provision for the filing of a claim in abatement for the taxable year 1918 based on the fact that a substantial loss has been sustained arising from shrinkage in inventory value, and it further provided:

> "In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with surety satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest."

This provision for the filing of a claim in abatement and for staying the collection of the tax was the one considered by this Court in the case of *John Barth Company v. United States, 279 U. S. 370,* and is quoted therein at pages *373* to *374.* Manifestly, it could have no application to the case at bar, because this provision of the law only dealt with taxes for the year 1918, whereas in the case at bar the taxes were for the year 1917, and the 1917 Act contained no provision for the filing of abatement claims or for staying the collection of taxes upon their filing.

2. It will be noted that *Section 611 of the Revenue Act of 1928* does not prohibit recovery in a suit, but merely provides that the payment "shall not be considered as an overpayment under the provisions of *Section 607*" of that Act. As pointed out by the District Court (Oregon) in *Giles & Jenks v. Huntley, Collector, 29 F. (2d) 904,* plaintiffs do not and did not base their right to recovery upon *Section 607 of the Revenue Act of 1928.* Their suit was filed before the enactment of that Section, and if that Section had never been enacted they would have had a right to recover under *Sections 3220, 3226* and *3227*

of the Revised Statutes, as construed by this Court in the case of *Bowers v. New York & Albany Lighterage Company, 273 U. S. 346.* Reading and applying *Section 611* literally, it is immaterial whether the overpayment is one within the terms of *Section 607* or not, because petitioners' right to recovery is not predicated on that Section.

In the opinion in the case of *Bessemer Coal & Coke Company v. Heiner,* not yet reported, Judge Schoonmaker said:

> "*Section 611 of the Revenue Act of 1928* can only be made to apply to the instant case by giving it retroactive effect. This should only be done when the legislative purpose to do so plainly appears. *United States v. Magnolia Oil Company, 276 U. S. 160, 162; United States v. Russell, 278 U. S. 181, 187.* There are no words in the Act which can clearly be construed as a ratification of the collection of a tax which was barred by the Statute of Limitations at the time it was paid.
>
> The views we here express are in accord with the views of Judge Gibson of this Court in *Clinton Iron & Steel Co. v. Heiner, 30 F. (2d) 542;* those of Judge McVicar of this Court, in *Erie Coal & Coke Co. v. Heiner, 33 F. (2d) 135;* and those of Judge Deaver of the District Court, for the Middle District of Georgia, in *Burden Smith & Co. v. United States, 32 F. (2d) 231.*"

3. However, even if that Section be construed to apply to a case such as the case at bar, yet the reversal of the judgment of the District Court by the Circuit Court of Appeals is erroneous because it does not appear from the stipulation that the collection of the taxes sought to be recovered was stayed by the claim in abatement. In *General Counsel's Memorandum No. 5665,* pub-

lished in *Cumulative Bulletin VIII-1, at page 130,* the General Counsel for the Bureau of Internal Revenue says:

> "The mere filing of a claim in abatement does not satisfy the provisions of Section 611."

And that the filing of a claim in abatement does not in and of itself operate to stay the collection of the taxes, was also recognized in *General Counsel's Memorandum 2757,* published in *Cumulative Bulletin VII-2, at page 302.* In numerous cases, such as that dealt with in the case of *John Barth Company v. United States, 279 U. S. 370,* a bond was required, and in such cases it was the bond and not the abatement claim which stayed the collection of the taxes. In other cases Collectors refused to withhold the collection of taxes upon the filing of an abatement claim unless they were supplied with statutory written consents to the extension of the Statute of Limitations. In a number of these cases the time agreed upon in these consents for the collection of the taxes was allowed to expire before they were collected, and in such cases it is now sought to retain them by claiming that the collection was stayed by the claim in abatement, when, as a matter of fact, in such cases it was the written consent to the extension of the Statute of Limitations and not the claim in abatement which stayed the collection.

Whether the collection was stayed by a claim in abatement or for some other reason is a question of fact, and from the stipulation in the case at bar it does not appear that the collection was so stayed, and for that reason *Section 611* cannot be availed of as a defense to the suit. As observed by the Circuit Court of Appeals, the title of the Section is "Collections Stayed By Claim in

Abatement", and the title should be used in construing the Section. From this it appears that in order for this Section to apply, the claim in abatement and not some other reason must have stayed the collection of the taxes.

4. Moreover, it is not every stay of collection by means of a claim of abatement that is within the scope of *Section 611*. In *General Counsel's Memorandum No. 5665*, published in *Cumulative Bulletin VIII-1, at page 130*, it was ruled that if a claim in abatement was filed after the Statute of Limitations had run, notwithstanding it then stayed the collection of the tax, yet such stay was not within the meaning of *Section 611*.

Apparently *Section 611* meant that if a claim in abatement did stay the collection of the taxes *until after the Statute of Limitations on their collection had run*, then the payment of them should not be treated as an overpayment under *Section 607*. No claim in abatement could operate to stay the collection of taxes any longer than a reasonable period after its rejection. In the case at bar the Statute of Limitations did not run on the collection of the taxes until March 22, 1923. The sixth paragraph of the stipulation shows that the claim in abatement was rejected on December 27, 1922. After the rejection of this claim the Collector had three months lacking five days in which to collect the taxes, before the Statute of Limitations on their collection expired. He did not attempt to collect them until November 19, 1924, or one year, ten months and twenty-two days after the rejection of the abatement claim, although he had a reasonable time after the rejection of the abatement claim and before the expiration of the Statute of Limitations within which to make their collection. Inasmuch as after the abatement claim was rejected, ample time remained

to collect the taxes before the expiration of the Statute of Limitations, how can it be said that the abatement claim postponed the collection of the taxes until after the Statute had run?

5. The Circuit Court of Appeals, for the Ninth Circuit, in *Huntley, Collector, v. Gile, et al, 32 F. (2d) 857*, reversing the judgment of the District Court, held that *Section 611*, retroactively applied, was constitutional on the supposed authority of *United States v. Heinszen & Co., 206 U. S. 370*, and *Rafferty, Collector, v. Smith, Bell & Co., 257 U. S. 226*. The *Rafferty case* follows the *Heinszen case*. In the *Heinszen case* two justices dissented, one did not participate, and Mr. Justice Harlan specially concurred on the ground that the suit was against the United States and it had a right to attach any conditions to its right to be sued or to take away that right. In considering *Section 611* these two cases are distinguished in *Clinton Iron & Steel Co. v. Heiner, 30 F. (2d) 542*, at pages *544* and *545*, and by another judge of the same Court this distinction was concurred in in the opinion in *Erie Coal & Coke Co. v. Heiner, 33 F. (2d) 135*.

In the case of *Pepsin Syrup Company v. Schwaner, 35 F. (2d) 197*, the Court held that Congress had not the power to give *Section 611* retroactive effect and relied on the rule which is plainly stated in *17 Ruling Case Law* at pages *674* and *675*. In this connection see also *William Danzer & Co., Inc., v. Gulf & Ship Island Railway Co., 268 U. S. 633*.

DeLima v. Bidwell, 182 U. S. 1, was a suit against the Collector as distinguished from a suit against the United States. In that case the Court divided five to four, but

at pages 199 and 200 of the majority opinion the following statement appears:

> "As the action in this case was brought March 13, 1900, eleven days before the Act was passed, the right to recover the money sued for could not be taken away by the subsequent act of Congress. Plaintiffs sued in assumpsit for money which the Collector has in his hands justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action would be beyond its power."

In the case of *United States v. Heinszen, 257 U. S. 226,* the above statement is quoted and disagreed with, but the ground set forth by Mr. Justice Harlan in his specially concurring opinion was alone sufficient for a decision in that case.

The Sections under consideration in the case at bar do not withdraw the defense of the Statute of Limitations. Any taxpayer who has not paid the tax claimed and who has that defense may make it and they are making it successfully before the Board of Tax Appeals. It withdraws no defense, but on the contrary it seeks, if construed as contended for by the Government, to give the defendant an immunity which he did not have before its enactment, and to deprive petitioners of their property and transfer it to the defendant in his official capacity.

All of which is respectfully submitted,

JOHN E. HUGHES,
Counsel for Petitioners.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1930.

No. 36

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A COPARTNERSHIP,

Petitioners,

vs.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

Decisions of the
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 36.

R. E. GRAHAM AND E. E. FOSTER, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A CO-PARTNERSHIP,

Petitioners,

vs.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

OPINION BELOW.

The judgment of the United States District Court was rendered without written opinion. The opinion of the Circuit Court of Appeals for the Ninth Circuit reversing the District Court is reported in 35 Fed. (2d) 586.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered November 4, 1929 (R. 36). Petition for writ of certiorari was filed January 20, 1930, and the writ was granted March 3, 1930 (281 U. S. 708). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Are Sections 611 and 607 of the Revenue Act of 1928 (which was enacted May 29, 1928) retrospective in operation so as to destroy the right to a recovery where, as in this case, the claim for refund was filed and acted upon by the Commissioner of Internal Revenue before their enactment, and to obliterate an existing cause of action in a pending suit in which the right of recovery existed when the suit was brought?

2. Can these sections be successfully invoked by the respondent as a defense where there is no showing that the collection of the tax was stayed by the claim in abatement?

3. Even in cases where the collection of the tax was stayed by a claim in abatement but was not stayed by the claim until after the statute of limitations had run and after the rejection of the claim sufficient time remained in which to collect the tax before the running of the statute of limitations, do these sections apply?

4. If these sections operate retrospectively so as to obliterate an existing cause of action in which the petitioners had a clear right to recover at the time issue was joined therein, are they contrary to the Fifth Amendment to the Constitution?

STATEMENT OF THE CASE.

The facts in this case were stipulated and they appear at pages 11 to 14 of the record.

This stipulation shows that after the statute of limitations had run against the respondent's right to collect an income and profits tax from the petitioners he served a notice and demand on them to pay additional taxes in the amount of $7,034.71, together with interest in the sum of $2,004.69, totaling $9,039.40, and threatened to enforce and compel the payment of said taxes and interest by distraint and sale of petitioners' property. The petitioners, being unable to procure an injunction against the respondent, to prevent the seizure and sale of their property, did, under duress and protest, pay to the respondent the said sum of $9,039.40, making the payment in two installments, to-wit: the sum of $2,039.40 on November 29, 1924, and the sum of $7,000.00 on December 3, 1924.

The pertinent dates are as follows (R. 11-14):

March 22, 1918, return for 1917 was filed.
January, 1920, additional assessment made.
February 11, 1920, claim in abatement filed.
December 27, 1922, claim in abatement rejected.
March 22, 1923, expiration of five-year period for collection of tax.
November 19, 1924, notice and demand for payment of tax made.
November 29, 1924, and December 3, 1924, tax collected.
September 25, 1925, claim for refund filed.
January 13, 1926, claim for refund rejected.
December 23, 1927, suit commenced.

The District Court entered judgment for the petitioners, but upon appeal the Circuit Court of Appeals, in an

opinion reported in 35 Fed. (2d) 586, held that Section 611 of the Revenue Act of 1928, which had not been brought to the attention of the District Court by respondent, barred recovery in this case and reversed the judgment of the District Court.

It is undisputed that on March 22, 1923 the right of the respondent to collect any additional tax for 1917 from the petitioners became barred by the statute of limitations under the decisions of this court in *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, and *Russell* v. *United States,* 278 U. S. 181, and that in collecting it he did an illegal act for which he became liable to petitioners under said decisions. At the time he collected this tax the respondent was advised not only by the petitioners' protest but also by the decision of the Circuit Court of Appeals for the Second Circuit in *Seaman* v. *Bowers,* 297 Fed. 371, decided March 17, 1924, that he was doing an illegal act.

The assessment was made in January, 1920, and on February 11, 1920, petitioners filed a claim in abatement. This claim in abatement was rejected December 17, 1922. After the rejection of this claim in abatement the respondent had three months, lacking five days, in which to collect the taxes from the petitioners before the statute of limitations on his right to collect them expired. He did not attempt to collect until November 19, 1924, or one year, ten months and twenty-two days after the rejection of the abatement claim, at which time he collected them from the petitioners by threats to seize and sell their property and by duress.

Petitioners filed a claim for refund on September 25, 1925 claiming that the money exacted from them was illegally and wrongfully and erroneously collected because of the statute of limitations. This claim was rejected by

the Commissioner on January 13, 1926. At the time the claim was filed and at the time it was rejected it was admittedly allowable under the law as it existed at that time.

The respondent says in defense that Sections 611 and 607 of the Revenue Act of 1928 grant him complete immunity for what he did.

STATUTES INVOLVED.

The statutes involved are Sections 607 and 611 of the Revenue Act of 1928, which was enacted May 29, 1928, and which are as follows:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 716. EFFECTIVE DATE OF ACT. Except as otherwise provided, this Act shall take effect upon its enactment."

ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that Section 611 was retroactive to the extent of obliterating an existing cause of action in which the petitioners had a clear right to recover a judgment at the time said action was begun.

2. In failing to hold that Section 611 of the Revenue Act of 1928 did not apply to the case at bar because it did not appear therein that the collection of the tax, for the recovery of which the District Court had rendered judgment, was stayed by the claim in abatement.

3. In failing to hold that Section 611, if construed to deprive petitioners of the right to a judgment which clearly existed at the time the wrong was done by the respondent and at the time the issue was joined in the District Court in the case at bar, deprived petitioners of property without due process of law and was in violation of the Fifth Amendment to the Constitution of the United States.

Decisions of the Courts on These Sections.

The Circuit Courts of Appeal on these sections have divided two in favor of the taxpayer and two in favor of the Government.

The Circuit Courts of Appeal deciding in favor of the taxpayer are the Third Circuit in *Heiner* v. *Erie Coal & Coke Company*, 42 Fed. (2d) 214; and the Fifth Circuit in the case of *United States* v. *Burden, Smith & Company*, 33 Fed. (2d) 229. Both of these decisions affirm the decisions of the District Courts reported in 33 Fed. (2d) 135 and 32 Fed. (2d) 830, respectively.

The Circuit Courts of Appeal which have decided the question in favor of the Government are the Ninth Circuit in the case at bar (reversing the District Court) and in *Huntley* v. *Gile & Jenks*, 32 Fed. (2d) 857 (reversing the District Court reported in 29 Fed. (2d) 209); and the Second Circuit in the case of *Reeves* v. *Anderson*, ___ Fed. (2d) _____, affirming the District Court.

The United States Court of Claims decided in *Wyman, Partridge & Company* v. *United States*, 41 Fed. (2d) 886, that where the liability for the tax was extinguished these sections had no effect and, in another line of decisions of which the case of *Oak Worsted Mills* v. *United States*, 36 Fed. (2d) 529 is an example, decided that prior to the Revenue Act of 1926 the statute of limitations merely barred the remedy and did not extinguish the liability and consequently these sections were effective in such case. In this brief we endeavor to show that the statute of limitations prior to 1926 did extinguish the liability and that the distinction made by the Court of Claims as to payments made prior to the enactment of the Revenue Act of 1926 is due to a misapprehension of the law. No other court has made this distinction.

In the District Courts the decisions are in sharp conflict. Many unreported decision have been made. Among the reported decisions deciding the question in favor of the taxpayers are the following:

Pepsin Syrup Co. v. *Schwaner*, 35 Fed. (2d) 197.

Cutcheon v. *Rafferty*, 34 Fed. (2d) 708.

The Sugarland Industries v. *Bass*, 36 Fed. (2d) 375.

Diamond Alkali Company v. *Heiner*, 39 Fed. (2d) 643.

Bessemer Coal & Coke Co. v. *Heiner*, 39 Fed. (2d) 492.

Clinton Iron & Steel Co. v. *Heiner*, 30 Fed. (2d) 542.

Southern Lumber Company v. *U. S.*, ____ Fed. (2d) ____.

Judge FitzHenry, sitting in the Southern District of Illinois, decided in favor of the taxpayer in an unreported opinion on demurrer in the case of *Illinois Kaolin Company* v. *United States*, No. 17872 and Judge Carpenter, sitting in the Northern District of Illinois, entered judgment for the taxpayer in the case of *National Carton Co.* v. *Reinecke*, No. 36812.

In addition to the cases in the Court of Claims, the decisions in favor of the Government which we have been able to find are:

L. H. Woodward Co. v. *Anderson*, 34 Fed. (2d) 709.

Wright & Taylor v. *Lucas*, 34 Fed. (2d) 328.

Reeves v. *Anderson*, 37 Fed. (2d) 373.

North American Creamery Co. v. *Willcuts*, 38 Fed. (2d) 483.

Pigott v. *Poe*, 41 Fed. (2d) 273.

American Glue Co. v. *United States*, 42 Fed. (2d) 235.

We do not know of any unreported decisions in favor of the Government.

Before proceeding with the argument of the case, we desire to direct the Court's attention to the legislative history of Section 611 and for this purpose set forth the reports of the Committees of Congress. In doing so, we realize that the application of these reports to the case at bar is subject to the rule announced by the Circuit Court of Appeals for the Fifth Circuit in its decision on Section 611 in the case of *United States* v. *Burden, Smith*

& Company, 33 Fed. (2d) 229, which rule it stated as follows:

> "Reports of the Committees of the House and Senate may be looked to as aids in construing ambiguous or conflicting terms of the statute, but they cannot be taken as giving it a meaning not fairly within its words, *St. Louis Iron Mountain & S. R. Co.* v. *Craft*, 237 U. S. 648."

LEGISLATIVE HISTORY OF SECTION 611.

When what is now Section 611 was reported to the House, Report No. 2, 70th Congress, First Session, of the Ways and Means Committee, contained the following statement:

> Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the Collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer, even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.
>
> Your Committee appreciates the fact that this pro-

vision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment."

The foregoing report presented a section containing different provisions than that which eventually became law. The section presented with the above report actually did "withdraw the defense of the statute of limitations" by providing that amounts not yet collected might be collected within one year from the date of the passage of the Act. The fact that this did not become law has apparently been overlooked by some of the lower courts who quoted in their decisions in favor of the Government that part of the report which states that this section "merely withdraws the defense of the statute of limitations." (See *Reeves* v. *Anderson*, 37 Fed. (2d) 373, 377; and *Oak Worsted Mills* v. *United States*, 36 Fed. (2d) 529, 534.)

When the section as passed by the House went to the Senate it was eliminated from the Bill and in the report of the Finance Committee of the Senate concerning it, the following statement is made (Report No. 960, 70th Congress, First Session, p. 42):

"Section 611 of the House Bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the collection delayed by the filing of a claim in abatement, and also prohibits the refund of amounts paid after the statute of limitations in such cases. Your Committee believes that the bar of the statute should be made effective as to both the Gov-

ernment and the taxpayer had recommends that this Section be eliminated."

In the House Bill as amended by the Senate, this section was eliminated and it then went to conference where it was the subject of much debate.

When the Bill came from the conference, the Managers on the part of the House (not the Senate) submitted a statement to the House (Report No. 1882, 70th Congress, First Session, p. 22) in which it was said:

"AMENDMENT No. 190: The House bill (Sec. 611) provided that in cases in which a tax was assessed within the period of limitations upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded solely because of the fact that it was paid after the running of the statute, and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in court begun within one year after the enactment of the new law. The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection."

In the conference report itself it was merely stated:

"that the House recedes from its disagreement to the amendment of the Senate No. 190, and agrees to the same with an amendment, as follows:"

(Here Section 611 as enacted was set out).

As we have said, there was a sharp debate between the Managers on the part of the House and the Managers on the part of the Senate concerning this section. The Senate Managers wanted nothing of the kind in the Act and the House insisted on the sections it had originally

passed. As a result a compromise was reached by which the Managers on the part of the House got from the Senate much less than they supposed they were getting.

One of the Managers on the part of the House, and one of the principal proponents of Section 611, Representative Garner of Texas, said with reference to 611 in the Congressional Record, Vol. 69, p. 10136:

> "* * * It means $30,000,000 refund of taxes and $70,000,000 to be collected in the future from taxpayers. That was the basis of the $100,000,000 loss. When we got into conference we could not get the Senate to recede. We finally tied up on two questions—the furniture outfit and 611. I believe in telling how we do these things. We tied up on them. We wanted the Senate to recede from both, but they did not want to recede because some particularly selfish people were going to get the money. We do not believe in that, but the Senate does. The result is that we compromised. We made it 'original', and then we struck out subsection (b) of section 611, cutting out the $70,000,000 prospectively we were going to get, *because there was some doubt about the constitutionality of it,* and decided to keep the $30,000,000 that we had in the Treasury. That was the compromise between those two amendments, one of them cutting down and the other giving up the prospect of securing $70,000,000 in the future." (Italics ours.)

It is suggested that Mr. Garner's understanding of what Section 611 ultimately provided was different from what the Senate thought it was conceding to the House. All of which illustrates the wisdom of the rule laid down by this court, that expressions of individual members are not to be considered in construing a law and that even reports of committees can not be taken as giving a law a meaning not fairly within its terms.

In the Reports of American Bar Association, Volume 54, 1929, at page 340 appears the report of the Special

Committee on Federal Taxation, and at page 343 thereof the following statement appears:

"In the commitee's report of last year (A. B. A. Reports, vol. 53, page 398) it was noted, among other committee recommendations adopted in the pending Revenue Act of 1928, that Section 611 of the House bill, reopening in favor of the government cases barred by the statute of limitations, where a claim for abatement had been filed, was eliminated from the Senate bill. Unfortunately, as mentioned in the oral submission of the committee's report (A. B. A. Reports, vol. 53, page 105), part of Section 611 was reinstated in the act by action of the Conference Committee. The vagueness and possible unconstitutionality of the provision, then foreshadowed, have already led to several court decisions, the majority assigning to it little effect. See *Clinton Iron & Steel Co.* v. *Heiner*, 30 Fed. (2d) 542 (U. S. D. C., W. D. Pa.); *Erie Coal & Coke Co.* v. *Heiner*, 1929 C. C. H. I. T. S., par. D-9079 (U. S. D. C., W. D. Pa.); *Burden, Smith & Co.* v. *United States*, 32 Fed. (2d) 830 (U. S. D. C., Macon Div., M. D. Ga.), affirmed 1929 C. C. H., I. T. S., par. D-9285 (C. C. A., 5 Circ.); and *Cutcheon* v. *Rafferty*, IV. U. S. Daily 1188 (U. S. D. C., E. D. N. Y.). Cf. *Gile & Jenks* v. *Huntley*, 29 Fed. (2d) 209 (U. S. D. C., D. Ore.), reversed 32 Fed. (2d) 857 (C. C. A., 9 Circ.).

SUMMARY OF ARGUMENT.

The argument made in this brief is divided into six parts. A decision on any one of these parts in favor of petitioners will dispose of the case. These parts are:

(1) Sections 611 and 607 do not apply retroactively to cases in which refund claims were filed before their enactment. Section 611 merely provides that in cases within it, a payment made before or within one year after its enactment "shall not be considered an overpayment" under the provisions of Section 607.

Section 607 refers to payments made before or after its enactment but in providing how those payments are to be considered and on what kind of refund claims such consideration is to be afforded them its language is purely prospective.

This court has said that the presumption that a statute is prospective is "resistless except against an intention imperatively clear" and no law will be given a retroactive effect unless such be "the unequivocal and inflexible import of the terms." There is no unequivocal, inflexible and imperative provision for retroactive effect in Section 607.

Where Congress intended in the Revenue Act of 1928 to refer to refund claims which had been filed before its enactment it used the words "has been" or "was filed" and further when it intended any sections of that act to have retroactive operation it placed the heading "Retroactive" before them or otherwise clearly so provided in unambiguous terms from which there was no escape.

In view of the opinion of so many Federal Judges that Section 611 is not retroactive it would seem the utmost the respondent can claim is that there is a doubt about

the matter and assuming (but not conceding) a doubt, the application of the rule requiring doubts in tax laws to be resolved in favor of taxpayers will be decisive.

(2) Section 611 was intended to refer only to voluntary payments and not to money illegally exacted by duress. It refers to payments made "before or within one year" after its enactment. The Senate eliminated a provision in the House Bill authorizing collections to be made within one year after its enactment and the House was forced to agree to the elimination. The Treasury Department has correctly ruled that payments "made within one year after the enactment of this Act" means voluntary payments only and that Section 611 does not authorize enforced collection.

There is no basis in the words of Section 611 for distinguishing payments made before from payments made within one year after its enactment. A contract made under duress is no contract. A so-called payment exacted by duress is void and is no payment. When Section 611 refers to the "payment" of Internal Revenue Tax it must be taken to use this term in its ordinary and legal sense and not to thereby refer to illegal exactions by duress but to refer to voluntary payments.

(3) Not a word in Section 611 makes reference to a suit in court. This section does not apply to suits in court but only to administrative refunds. It is merely a subsidiary of Section 607. The sole purpose of the enactment of Section 607 was to authorize administrative refunds of taxes paid after the Statute of Limitations had run, which Section 1106(a) of the Revenue Act of 1926 had been judicially construed to prevent and at the same time had been judicially construed to have no effect on court actions. The legislative history of Section 607 conclusively shows that it was enacted solely to authorize administrative refunds of taxes collected

after the Statute of Limitations had run. From this it follows that the utmost effect of Section 611 is to limit Section 607 and to prevent an administrative refund of taxes under conditions within the provisions of Section 611 leaving the complicated legal questions usually attendant upon such a situation as is embraced within Section 611 to be determined by the courts.

(4) The conditions described by Section 611 are conditions of fact. They are like all other facts, provable by evidence. Section 611, if it has the effect contended for by the respondent, is a defense to the action and for that reason the burden is on a defendant to prove it. The burden of proof is also cast upon the defendant by virtue of the general rule that he who relies upon an exception to the running of a Statute of Limitations has the burden of proving it.

Aside from these rules there is a further rule that facts peculiarly within the knowledge of a party must be proved by him. The reason the respondent delayed the collection of the tax in the case at bar is peculiarly within his knowledge and could easily and conveniently have been proved by him and the burden of making this proof is for that reason cast upon him. He has made no attempt to meet this burden and has not proved a defense.

(5) It is furthermore submitted that not every delay of collection caused by a claim in abatement is within the scope of Section 611. If an abatemnt claim was filed after the Statute of Limitations had run and then delayed the collection the Treasury Department concedes and it has been judicially decided that such delay is not within the scope of Section 611.

Even in cases otherwise within its terms, it is submitted that Section 611 was never intended to apply un-

less the abatement claim delayed the collection of the tax until after the Statute of Limitations on the right to collect it had run.

If after the rejection of the abatement claim plenty of time remained before the limitation expired, to collect the tax and its collection was delayed for some other reason the case is not within the spirit and purpose of Section 611. The case at bar is such a case because after the rejection of the abatement claim and before the Statute of Limitations had run ample time remained to collect the tax.

(6) If construed as contended for by the respondent Section 611 violates the Fifth Amendment for any of the following reasons which are fully developed in the argument:

(a) It is arbitrary and unreasonable.

(b) It has the effect of recreating a liability which had long prior to its enactment been extinguished by statute.

(c) Without attempting to make the illegal taking of petitioners' property legal it attempts to retain it without paying them just compensation, thereby depriving them of their property without due process of law and by its unreasonable and baseless distinctions it denies them equal protection of the laws.

I.

SECTIONS 611 AND 607 OF THE REVENUE ACT OF 1928 DO NOT APPLY RETROACTIVELY TO ANY CASE WHERE THE REFUND CLAIM WAS FILED PRIOR TO THEIR ENACTMENT.

Whatever may be the effect of Sections 607 and 611 of the Revenue Act of 1928 with reference to claims filed after their enactment, it is submitted that so far as claims are concerned they are purely prospective, and refer only to refund claims filed after their enactment.

This point appears not to have been presented to any of the Courts which have decided cases involving Sections 607 and 611 against taxpayers. It is not considered in any of the opinions holding in favor of the Government.

It seems to us to be clearly conclusive and to dispose of this case, and the other points made and discussed herein are discussed merely due to an abundance of caution.

Section 611 standing alone has no effect. In order to emphasize this argument, we again set it forth:

> "SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

It appears that all this section provides is that under the circumstances stated a payment "made before or within one year after the enactment of this Act, shall not

be considered as an overpayment under the provisions of Section 607."

Section 607 is thus expressly incorporated in Section 611 and references must be made to it to determine the meaning of Section 611.

Although Section 607 refers to payments made before or after its enactment, yet its language is purely prospective with respect to providing how such payments shall be considered and on what kind of claims action under it shall be taken. For the convenience of the Court, we repeat this Section:

> "SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto **shall be considered** an overpayment and **shall** be credited or refunded to the taxpayer if claim therefor **is filed** within the period of limitation for filing such claims."

The words of this section "**shall be considered** an overpayment and **shall** be credited or refunded to the taxpayer if claim therefor **is filed** within the period of limitation for filing such claim," are purely prospective and manifestly do not refer to refund claims which had been filed before the Act was enacted. If Congress had intended to refer to such claims, it could easily have made the statute read "if claim therefor is or was filed," but it did not do so.

In the case at bar the claim had been filed and had been considered and disposed of by the Commissioner of Internal Revenue more than two years before the enactment of the foregoing section of the law, and suit for refund had been filed by the taxpayers before this section was enacted. Congress knew that many claims for re-

fund had been filed and denied prior to the enactment of the Revenue Act of 1928 and that many suits were then pending in Court and if it had intended to effect such cases it could easily have and would have said so.

Where Congress in the Revenue Act of 1928 intended to refer to refund claims which had been filed at the time it was enacted, it said so in language which was clearly retroactive. For example, Section 702 of the Revenue Act of 1928 provides:

> "Unless claim for refund or credit * * * *has been* filed by the estate before the expiration of the period of limitation for filing claims," (Italics ours)

In Section 507 of the Revenue Act of 1928 where Congress intended to refer to claims for refund which had been filed, it used this language:

> "Unless claim for credit or refund, or the petition, *was filed* within the time prescribed." (Italics ours.)

While Section 607 seems clearly and beyond a doubt to refer only to refund claims filed after its passage, yet if it should require construction the rules to be applied have been frequently stated by this court. In *United States* v. *Magnolia Petroleum Company,* 276 U. S. 160, this court said at page 162:

> "Statutes are not to be given retroactive effect or construed *to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.*" (Italics ours.)

In *Russell* v. *United States,* 278 U. S. 181, at page 187 this court quoted the foregoing rule with approval and in *Brewster* v. *Gage,* 280 U. S. 327 at page 337, the court applied the same rule and in *Schwab* v. *Doyle,* 258 U. S. 529, the court said at page 537:

> "The statute should not be given retrospective operation unless its words make that imperative."

In *Union Pacific R. R. Company* v. *Laramie Stock Yards Company*, 237 U. S. 190, this court said at page 199:

> "Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength, but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'. *United States* v. *Heth*, 3 Cranch 413, 2 L. Ed. 483; *Reynolds* v. *M'Arthur*, 2 Pet. 417, 7. L. Ed. 470; *United States* v. *American Sugar Ref. Co.*, 202 U. S. 563, 577, 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717; *Winfree* v. *Northern P. R. Co.*, 227 U. S. 296, 57 L. Ed. 518, 33 Sup. Ct. Rep. 273."

How can it be said in this case that "the unequivocal and inflexible import of the terms" is retroactive?

In *Bessemer Coal & Coke Company* v. *Heiner*, 39 Fed. (2d) 492, the Court said with reference to these very sections, 607 and 611:

> "Section 611 of the Revenue Act of 1928 (26 U. S. C. A. Section 2611) can only be made to apply to the instant case by giving it a retroactive effect. This should only be done when the legislative purpose to do so plainly appears, *United States* v. *Magnolia Co.*, 276 U. S. 160, 162, 48 S. Ct. 236, 72 L. ed. 509; *Russell* v. *United States*, 278 U. S. 181, 187, 49 S. Ct. 121, 73 L. ed. 255. There are no words in the act which can clearly be construed as a ratification of the collection of a tax which was barred by the statute of limitations at the time it was paid.
>
> The views as here expressed are in accord with the views of Judge Gibson of this court in *Clinton Iron & Steel Co.* v. *Heiner*, (D. C.) 30 F. (2d) 542; those of Judge McVicar of this court in *Erie Coal &*

Coke Co. v. *Heiner* (D. C.) 33 Fed. (2d) 135; and those of Judge Deaver of the District Court for the Middle District of Georgia, in *Burden, Smith & Co.* v. *U. S.* (D. C.) 32 Fed. (2d) 830, 831."

In *Gould* v. *Gould*, 245 U. S. 151, this court stated a firmly established rule of construction as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

In *United States* v. *Merriam*, 263 U. S. 179, the court said at page 187:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal form or expressions. *But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended beyond the clear import of the language used.* If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer." (Italics ours.)

In view of the opinions of the learned district Judges and of the Circuit Court of Appeals for the Third Circuit holding that Sections 607 and 611 are not retroactive, it would seem that the most respondent can claim is that there is a doubt about the matter. If so, the rule of construction requires that it be resolved in favor of petitioners.

It is submitted, however, that there is no room for doubt because the words used with reference to overpayments and refund claims are purely prospective. The words are "shall" and "is".

In *State* v. *Harmon*, 57 W. Va. 447, 50 S. E. 828, a provision of the Code that no sale or deed of any real estate

"shall be set aside or in any manner effected by reason of the failure of any officer to perform any duty herein required to be done or performed by him after such sale is made", was held to be purely prospective. The court said that the word "is" did not relate to past sales, and that the statute was to be given prospective operation only.

In *Hilgendorf* v. *Ostrom*, 46 Ill. App. 465, at page 470, the Court held that the certificate of a clerk of the court that a certain person "is" a Commissioner duly authorized to take proof of acknowledgment of deeds was insufficient to show that he was a Commissioner at a previous time.

In *State* v. *Jorgenson*, 25 N. D. 539, 142 N. W. 450, 462 the court held that the word "is" is not synonymous with "shall have been."

Should anything be needed beyond the words themselves to demonstrate that "shall" and "is" are prospective, then attention may be called to the fact that sections of the Revenue Act of 1928 as enacted by Congress bear headings. Section 607 does not bear after its heading the word "Retroactive." When Congress intended in the Revenue Act of 1928 to make its sections retroactive it placed a heading "Retroactive" before such sections as were intended to have retroactive effect. (See Sections 702 to 706 of the Revenue Act of 1928) or otherwise clearly provided for a retroactive effect.

In *Lincoln* v. *United States*, 202 U. S. 484, the language was much stronger than the language of Section 607 with reference to refund claims and there was more basis for the contention that the law was intended to be retrospective. This Court gave the language a purely prospective construction and in support thereof said at page 498:

"This construction is favored by the consideration

that the suits had been begun when the Act * * * was passed and that even if Congress could deprive plaintiffs of their vested rights in process of being asserted * * * still *it is not to be presumed to do so on language which, literally taken, has a narrower sense.*

Moreover, the Act * * * was passed with full knowledge and after careful consideration of the decisions of this court, and Congress was aware that grave doubt at least had been thrown upon its power to ratify a tax under circumstances like the present. *DeLima* v. *Bidwell*, 82 U. S. 1, 199, 200. This affords a special reason for believing that if it had intended to encounter the limitations of that case it would have done so in clear words from which there was no escape.

It should also be remembered that there was a powerful opposition in Congress, and that the phraseology of the act probably represents all that it was deemed safe to ask. *Every consideration requires that the ambiguous language of the Act should not be stretched beyond the exact and literal meaning of the words.*" (Italics ours.)

In the case at bar every consideration stated by the Court in the foregoing case is present, except that in the case at bar the words seem to be beyond doubt purely prospective and there seems no basis for the contention that they go to what action has been taken on refund claims filed prior to the enactment of the 1928 Act which action had been taken years before it was enacted.

When Sections 607 and 611 of the Revenue Act of 1928 had been enacted suits had been begun in which recovery was sought on the ground that the statute of limitations had run. Congress was fully aware of the decisions of this Court in the cases of *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, and *Russell* v. *United States*, 278 U. S. 181, allowing taxpayers to recover and if it had intended to divest and obliterate the right to recover in these pending suits, it certainly could have

plainly said so "in clear words from which there is no escape."

It should also be remembered that in this case there was a powerful opposition in Congress to the enactment of these sections. The Senate struck them out of the Bill and the Conferees finally compromised on these sections as enacted. As they stand they represent all that the House could get from the Senate and all "that it was deemed safe to ask."

Assume that the Revenue Act of 1926 made it illegal for the Commissioner to make a refund to a taxpayer on the ground that the statute of limitations had run. Suppose, however, he did make such refund late in 1926 and in 1927 filed a suit against the taxpayer to recover the money illegally refunded. Could the taxpayer set up Section 607 as a defense? We think not. It does not purport to be retroactive. The taxpayer in the assumed case would be met with the rule that the presumption that a law is prospective only, is "resistless except against an intention imperatively clear" (*Lynch* v. *Turrish*, 247 U. S. 221 at p. 230) and that the section would not be held retroactive unless, in the words of the court, "such be the unequivocal and inflexible import of the terms" and against these rules the other rule that all doubts are to be resolved in favor of a taxpayer and against the Government would not avail him.

II.

WHATEVER MAY OTHERWISE BE THE EFFECT OF SECTION 611 IT WAS NOT INTENDED TO APPLY TO PAYMENTS MADE UNDER DURESS BUT ONLY TO VOLUNTARY PAYMENTS.

It must be conceded by the Government that Section 611 does not authorize the collection of taxes where the circumstances specified by it exist. The legislative history of the Act set forth in this brief at pages 9 to 12 shows that a provision authorizing the collection of taxes under such circumstances within a period of one year after the date of the enactment of this section was stricken out by Congress.

The Treasury Department so recognizes in its ruling, Mimeograph 3660 published in Internal Revenue Cumulative Bulletin VII-2 at page 82, which provides in part as follows:

> "Section 607 and 611 do not authorize the Bureau *to enforce* collection of a tax *in any case* after the expiration of the period of limitations, but merely prescribe the effect of the period of limitation against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto. Therefore, no attempt will be made *to enforce* collection of any outstanding assessment if the period of limitation within which collection can be made has expired, or to make any assessment of any tax if the period of limitation within which the assessment can be made has expired, or to enforce collection of any tax if the assessment was not made within the period of limitation prescribed for the making of the assessment and if no suit for collection without assessment was begun prior to the expiration of such period."

Section 611, however, does provide that a payment

"made before or *within one year after the enactment of this Act*" shall not be considered an overpayment.

In view of the fact that the section does not authorize the collection of taxes to be made within one year after its enactment, but does provide that payments made within one year after its enactment shall not be considered overpayments under Section 607, manifestly it merely refers to voluntary payments and not to collection enforced by threats and by duress.

The Treasury Department promptly and properly construed the words "payment within one year after the enactment of this Act" to refer only to voluntary payments.

In its Mimeograph 3660 issued on July 27, 1928 and published in Internal Revenue Cumulative Bulletin VII-2 at page 82 it says at page 85:

> "In cases falling within the scope of section 611, and collection of the tax has become barred, the following procedure will be observed:
>
> (a) The taxpayer will be advised by the Income Tax Unit of its rights under section 611 of the Revenue Act of 1928, and unless it is disposed to make voluntary payment, within one year after the enactment of the said Act, after a full understanding of the meaning of such section, an appropriate certificate of overassessment will be issued."

In view of the action of the Senate in refusing to consent to allow any taxes to be collected by threats and duress within one year after the enactment of the Act, the Department could have put no other construction on this section than that which makes it apply to voluntary payments as distinguished from illegal exactions.

Even where a taxpayer had overpaid the tax for another year the Department did not credit the overpayment against the liability which had become extinguished

by the Statute of Limitations under the circumstances described in section 611.

It is respectfully submitted that there is no reasonable basis for holding that that part of the law which refers to payments made within one year after the enactment of the Act refers to voluntary payments, while that part of it which refers to payments made before the enactment of the Act refers not only to voluntary payments but to illegal exactions.

In the ordinary sense of the word, money exacted from one by duress is not a payment at all and section 611 by its express words refers to "the payment" of "any internal revenue tax."

In *Pierce* v. *Brown,* 7 Wall. 205, this court said:

> "Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent."

If a contract procured by duress is void and no contract then a so-called payment collected by duress is void and is in reality no payment. This lends further support to the contention that the word "payment" in Section 611 was intended to mean a voluntary payment and was used by Congress in its legal sense.

If a man should point a revolver at your honor on the street and order you to hand over your money to him, it could not be said that you had made a payment to him, in the ordinary sense of the word. If a Collector by threats to seize and sell petitioners' property and ruin their business exacts money from them by force of the distress warrant which he holds in one hand, they have not made a payment to him in the ordinary sense of the word any more than one makes a payment to the bandit who without warrant of law, holds him up at the point of a pistol.

In *Clinton Iron & Steel Company* v. *Heiner*, 30 F. (2d) 542, the court adopts this view of section 611, saying:

> "If it has any retroactive force it is in respect to a demand upon the United States for the return of an amount voluntarily paid, and not in connection with a personal suit theretofore brought against a Collector of Internal Revenue to recover an amount paid under duress at a time when no legal liability existed on the part of the taxpayer."

And the Circuit Court of Appeals for the Third Circuit in *Heiner* v. *Erie Coal & Coke Company*, 42 F. (2d) 214, says that it concurs in the reasoning of the District Court in *Clinton Iron & Steel Company* v. *Heiner*, 30 F. (2d) 542.

Other Federal Judges are of the same opinion.

III.

THERE ARE NO WORDS IN SECTIONS 607 AND 611 WHICH OBLITERATE AN EXISTING CAUSE OF ACTION IN A PENDING SUIT AGAINST A COLLECTOR IN WHICH THE RIGHT TO RECOVERY EXISTED WHEN THE SUIT WAS BROUGHT.

The case at bar is not an action against the United States.

It is firmly established by decisions of this Court that an action against a Collector is in no effect a suit against the United States. (See *Sage* v. *United States*, 250 U. S. 33; *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1 and *Levy* v. *Wardell*, 258 U. S. 542.)

Actions against Collectors of Internal Revenue and against officers of the United States for wrongful acts exist by virtue of the rules of the common law. *United States* v. *Lee*, 106 U. S. 196. They are not exempt from

personal liability because they purport to act for the United States in doing the wrong. All public servants are creatures of the law and if they go beyond it they are answerable. This rule is more applicable in a country where public officers are public servants than in one where they are public masters. Even in England where the rule was "the King can do no wrong" the agents and officers of the King were held accountable for illegal acts (*Hall* v. *Smith,* 2 Bing 156; 9 J. B. Moore, 266, 2 L. J. C. P. 113) and this rule was a part of the common law adopted in this country.

Long before the creation of the Court of Claims and long before taxpayers were given the right of action against the United States for the recovery of taxes, this Court affirmed their right to a personal cause of action against the Collector. (*Elliott* v. *Swartwout,* 10 Pet. 137 decided in 1836.)

In 1839 (5 Stat. 348 ch. 82, sec. 2) Congress passed an Act requiring the Collector to pay into the Treasury all sums collected without retaining any, awaiting "the result of any litigation in relation thereto" and provided that when "it shall be shown to the satisfaction of the Secretary of the Treasury * * * more has been paid than the law requires he shall draw a warrant for it." This Court held in *Cary* v. *Curtis,* 3 How. 236, that by this Act Congress had substituted an administrative remedy for an action in the courts against the Collector and inasmuch as Congress had the right to substitute an administrative for a judicial remedy an action against the Collector could no longer be maintained. This decision was made over the dissent of Mr. Justice Story.

A sharp and vital distinction is to be taken between that case and the case at bar. In the case at bar, if the law, as contended for by the Government, abrogates the

right to sue the Collector, Congress has substituted no other remedy. It is submitted that the only way Congress can do this is by ratifying or reimposing the tax and this it has not done in the case at bar. Manifestly sections 607 and 611 impose no tax. They say nothing about ratification.

That Congress did not intend to substitute an administrative for a judicial remedy by the Act of 1839 is shown by the fact that when it learned the decision in *Cary* v. *Curtis,* 3 How. 236, had been made, it passed the Act of February 26, 1845 (5 Stat. 727) wherein it gave taxpayers by clear and unambiguous language the right to maintain an action at law against the Collector and thereby repealed the effect of the decision in *Cary* v. *Curtis,* 3 How. 236, and restored the action against the Collector to its common law basis (see *Schell* v. *Fauche,* 138 U. S. 564).

In *United States* v. *Emery, Bird, Thayer Realty Co.* 237 U. S. 28, this court said at page 31:

> "The right to sue the Collector for an unjustified collection was given by the common law."

In *Smietanka* v. *Indiana Steel Company,* 257 U. S. 1, the court said at page 4:

> "Later statutes, however, recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to the successors, as was held in this case, the formal defendants being saved from harm by the United States. This, however, is not the language of the statutes, and hardly can be reconciled with the decision of this court in *Sage* v. *United States,* 250 U. S. 33, and other cases to which we shall refer."

It must be admitted that there are no words in Sections 611 and 607 which expressly obliterate a right to recover in a pending action at law against a Collector of

Internal Revenue or purport to take away the right to sue a Collector. Section 611 merely provides that in the circumstances stated a payment of tax "shall not be considered as an overpayment under the provisions of Section 607."

In order to avail himself of Section 611 as a defense it becomes incumbent on the respondent to show that this section clearly and beyond a doubt took away taxpayers existing and vested right to recover a judgment against him and granted him immunity for his wrongful and illegal act.

In view of the language of Section 611 it seems to us that the respondent can sustain this burden only by showing that recovery could not have been had against him except for the provisions of Section 607 and that petitioners' suit is based upon Section 607. For the reason previously stated, petitioners' suit was not and could not have been based upon Section 607. It was filed and issue was joined therein before that section was enacted. That section says nothing about actions in court or about Collectors of Internal Revenue. When section 607 was enacted petitioners were clearly entitled to recover under pre-existing law. Section 607 does not expressly purport to amend existing law. There is nothing in it which supplants, modifies, qualifies or derrogates from the provisions of the Revised Statutes or from the provisions of the Common Law. It should not be extended by construction beyond "the exact and literal meaning of the words".

Whenever Congress, in the Revenue Act of 1928 intended to amend the provisions of the Revised Statutes it appears to have clearly so provided, by express reference to those statutes. (See Revenue Act of 1928, sections 613, 615, 425.)

If Sections 607 and 611 do not expressly amend existing law do they amend or repeal it by implication?

The rule as to repeals by implication is thus stated in *Stevens* v. *Biddle*, 298 Fed. 209 at p. 212:

> "* * * It is a well-settled canon of construction that repeals by implication are not favored, and will not be held to exist, if there is any other reasonable construction; and if a former act can be harmonized with a later one, it is the duty of the court to enforce it".

In *Washington* v. *Miller*, 235 U. S. 422, the court said:

> "* * * such repeals (by implication) are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both."

There is no irreconcilable conflict between the statutes here under construction and pre-existing law.

Why, then, was Section 607 of the Revenue Act of 1928 enacted?

The events which lead up to the enactment of Section 607 of the Revenue Act of 1928 *conclusively show that Section 607 was merely intended to remove doubt as to the right of the Commissioner to make administrative refunds of taxes collected after the statute of limitations had run on the ground that they were so collected.* Doubt had been cast upon this right by the following provision of Section 1106 (a) of the Revenue Act of 1926:

> "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; *but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax".* (Italics ours.)

The following legislative history of this section conclusively shows that Congress considered that part of it which extinguished the liability to be merely declaratory

of pre-existing law and intended to allow a taxpayer from whom taxes had been collected after the limitation had run to recover in court actions.

In *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, decided December 7, 1925, the Court of Claims held that Section 250(d) of the Revenue Act of 1921 merely barred the remedy and did not extinguish the liability, and if taxes were collected by a Collector after the Statute of Limitations had run, they could not be recovered by taxpayers in a suit against the United States. Obviously this was contrary to the doctrine laid down by this court in *Graham* v. *Dupont*, 262 U. S. 234, in which the taxpayer sought an injunction on the ground that there was no adequate remedy at law, but this court reversed the decision allowing the injunction, and held that the taxpayer's remedy was to pay the tax and bring suit to recover it. In that case the government had said in its brief that this remedy at law was plain, adequate and complete.

Nevertheless, this decision of the Court of Claims caused many taxpayers to be disturbed and Congress attempted to remedy it by Section 1106(a) of the Revenue Act of 1926, which was incorporated in the House Bill as an amendment by the Senate. In support of this amendment, Senator Reed made the following statement (Congression Record, Volume 67, Part IV, page 3531):

> "Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the Collector may nevertheless issue his distraint, and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, cannot plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposter-

ous result, it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue, and while I feel reasonably confident, with all respect to the Court of Claims, that that case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now."

The Report of the House Conferees, who reported out the amendment in its final form, contained the following explanation:

> "This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *United States*) although in a case presenting the specific point, this opinion would probably not be followed by the Supreme Court. (See Taft C. J.; In *Graham* v. *Dupont*, 262 U. S. 234, 256, 258." (House Report No. 356, 69th Congress, First Session, p. 55).

This Court granted Certiorari in the case of Toxaway Mills on March 8, 1926 (270 U. S. 637), (after the enactment of the Revenue Act of 1926) and the Solicitor General confessed error and this Court reversed the case in 273 U. S. 781 on March 14, 1927.

The decision of this Court reversing the case in 273 U. S. 781 being made after the enactment of Section 1106(a), amounted to a judicial decision that Section 1106(a) did not prevent recovery in a suit against the United States the basis of which was the illegal collection of the tax after the statute of limitations had run. In a suit against a collector, the case of *Bowers* v. *N. Y. & Albany Lighterage Co.*, 273 U. S. 346 was like authority.

Notwithstanding that the legislative history of Section 1106(a) of the Revenue Act of 1926 conclusively shows that the intent of Congress in enacting it was to reverse the decision of the Court of Claims in the case of Toxaway Mills (which held that Section 250(d) of the

Revenue Act of 1921 only barred the remedy but did not extinguish the liability and that taxpayers from whom a tax was collected after the running of the statute of limitations could not recover it) and notwithstanding that the sole purpose of Section 1106(a) was to clarify the right of such taxpayers to recover in lawsuits, nevertheless when this case came back to the Court of Claims on the reversal mandate of this Court, that court in 63 Ct. Cl. 646 intimated that if it were not bound by the mandate of this Court it would make a contrary decision because of Section 1106(a) of the Revenue Act of 1926, and in *Chapman* v. *United States,* 63 Ct. Cl. 424, it did make such contrary decision holding that Section 1106(a) of the Revenue Act of 1926 prevented a taxpayer recovering in a suit on the ground that the statute of limitations had run and raffirming the said doctrine advanced by it in the case of Toxaway Mills, which decision the foregoing legislative proceedings conclusively show Section 1106(a) was intended by Congress to reverse and which case this court did reverse. The Court of Claims persists in that construction to this day.

In *Thornhill Wagon Company* v. *Noel,* 17 Fed. (2d) 407 (D. C. Ga.) at page 409, the Court construed Section 1106(a) as applicable only to refunds by the Commissioner and not to suits in Court against the Collector and in *Gove* v. *Nichols,* 23 F. (2d) 856 (D. C. Mass.) this holding was concurred in.

In *Ellay Company* v. *Bowers,* 25 Fed. (2d) 637 (certiorari denied 277 U. S. 606), the Circuit Court of Appeals for the Second Circuit held that Section 1106(a) "in no wise effects the apparent remedy at law to sue for recovery of taxes after payment".

The conclusion of the Circuit Court of Appeals for the Second Circuit was undoubtedly correct and the conclu-

sion of the Court of Claims was clearly wrong in the light of the legislative history of Section 1106(a) and of the reversal of the Court of Claims decision in the case of the Toxaway Mills by this court.

The words used are "refunds" and "credits". Collectors of Internal Revenue have no authority to allow "refunds" and courts do not allow "credits" or make "refunds".

These words denote administrative action.

The Commissioner of Internal Revenue seemed to think that the right of recovery of taxpayers adjudicated by this Court in the case of *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, "should be limited to refunds resulting from court decisions and has no application to refunds by the Commissioner."

In I. T. 2382, published in C. B. VI-2 at page 102, he published the following:

> "Many inquiries are being received both from within and without the Bureau as to the action which the Bureau should take in making refunds as a result of the decision of the Supreme Court in the case of *Bowers* v. *New York & Albany Lighterage Co.*
>
> Great uncertainty exists as to the extent and application of the decision of the Supreme Court. It has been suggested that the New York & Albany Lighterage Co. decision may have no application to cases where bonds were filed or where claims in abatement were filed, and that, in view of section 1106 of the Revenue Act of 1926, the decision should be limited to refunds resulting from court decisions and has no application to refunds by the Commissioner. Furthermore, section 1106 was not raised in the Albany Lighterage Co. case and was not considered in connection with the confession of error made by the Government in the Toxaway Mills case before the Supreme Court (47 S. Ct. 471). The subsequent action of the Court of Claims raises grave doubt as to the application of the Albany Lighterage Co. decision to other cases in view of Section 1106.

In view of the great uncertainty as to the whole matter, it is believed that no action toward making refunds should be taken by the Bureau in reliance upon the Albany Lighterage Co. decision unless and until the situation is clarified by further court decisions or by legislative action. The problem is already under consideration by the Joint Committee on Internal Revenue Taxation, and it will be presented to the Congress as soon as it convenes for such action toward a clarification of the situation as it deems proper."

In accordance with the above pronouncement made by the Commissioner in 1927, he refused until the enactment of Section 607 of the 1928 Act to make administrative refunds of taxes collected after the statute of limitations had run and left taxpayers to their remedy by suit.

Section 607 of the Revenue Act of 1928 was not enacted to amend the provisions of the Revised Statutes dealing with suits against collectors, nor to amend the provisions of the statute dealing with suits against the United States, but was enacted solely to permit the Commissioner of Internal Revenue to make administrative refunds of taxes collected after the statute of limitations had run, which refunds he had refused to make since 1927. Such being its sole purpose how can it be said to affect suits in court?

Report No. 2 of the House of Representatives, 70th Congress, First Session, presented by the Ways and Means Committee which submitted Section 607 of the Revenue Act of 1928 reads as follows with reference to this section:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax

or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Sec. 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Sec. 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under Section 1106 (b) of the 1926 Act or section 606 of the new Bill."

All of the foregoing shows that Section 607 was not intended to and did not purport to amend the Revised Statutes pertaining to suits against Collectors, or to amend the statutes pertaining to suits against the United States and under that construction of pre-existing law by this court in the case of *Bowers* v. *New York & Albany Lighterage Company* and *Toxaway Mills* v.

United States, both of which were decided after the enactment of Section 1106 (a) of the 1926 Act and before the enactment of Section 607, it conferred no rights on taxpayers so far as court actions were concerned which did not exist before its enactment.

In view of Section 611 being merely a limitation on Section 607, it is submitted that unless the provisions of these sections be extended beyond the plain meaning of the words, they do not obliterate the right of recovery in actions at law against Collectors of Internal Revenue which were pending when said sections were enacted, and the greatest extent to which they go is to prohibit the Commissioner of Internal Revenue allowing refund claims filed subsequent to the enactment of Section 607.

In an effort to have this court extend these sections beyond their words the respondent may answer this contention as did the Court in *Reeves* v. *Anderson,* ____ Fed. (2d) ____, saying it should not prevail for two reasons, viz.: (a) Section 3226 of the Revised Statutes requires the filing of a claim for refund as a condition precedent to suit against the Collector and it would be an unusual thing to require as a condition precedent an application which could not be granted, and (b) "It is difficult to conjure any reasons which Congress could have had for obliterating the more commodious way for settling such controversies, and still exposing the Treasury to actions of law which would result in exactly the same thing."

The answer to the argument first advanced is obvious. Section 3226 is a general statute and Congress could easily have overlooked the necessity of amending it to take care of isolated exceptions and did so in at least one other instance. This is apparent when the provisions of Section 284 (c) of the Revenue Act of 1926, which is still

the law, are considered. The section provides that in case a taxpayer's invested capital is decreased by the Commissioner because the taxpayer failed to take adequate deductions in any prior year, a refund shall be made by the Commissioner of Internal Revenue "without the filing of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) or (g) has expired."

Although this section does away with the necessity of filing a claim for refund where the situation it specifies exists, yet Congress did not expressly amend Section 3226 of the Revised Statutes to do away with the necessity of filing a refund claim as a condition precedent to suit.

In answer to the statement that "it is difficult to conjure any reason which Congress could have had for obliterating the more commodious way of settling such controversies and still exposing the Treasury to actions of law which must result in exactly the same thing" it may be said that it is based on the premise that a reason is always to be found for what Congress does. Experience has demonstrated the contrary.

However, a substantial reason can be found for prohibiting the Commissioner making refunds in cases where collection was delayed by an abatement claim until after the limitation had run. The question as to the taxpayer's right to a refund was purely legal. In the overwhelming majority of such cases a bond had been entered into by the taxpayer (*United States* v. *John Barth Co.* 279 U. S. 370) and in other cases money or liberty bonds had been deposited in escrow under an escrow agreement (*Mascot Oil Co.* v. *United States*, 42 F. (2d) 309). In such cases the question whether the taxpayer was entitled to a refund was extremely technical and

called for a knowledge of the law of suretyship and for a construction of escrow agreements. This situation did not exist in the case of ordinary payments made after the Statute of Limitations had run.

Congress has disclosed some jealousy of administrative refunds as evidenced by frequent debates and by the provisions of Section 710 of the Revenue Act of 1928 which provide that "no refund or credit" in excess of $75,000.00 shall be made until a report of it has been filed for 30 days with the Joint Committee on Internal Revenue Taxation. This provision has never been construed by the Department or by the Committee to relate to payments made pursuant to court judgments.

Its legislative history shows that Section 607 was enacted to authorize administrative refunds of taxes voluntarily paid after the statute of limitations had run (in *Peerless Woolen Mills* v. *Rose*, 24 F. (2d) 576, *Thornhill Wagon Co.* v. *Noel* 17 F. (2d) 407 and *Gove* v. *Nichols*, 23 F. (2d) 856, it had been held that Section 1106(a) prohibited such refunds). Section 611 was merely a limitation on Section 607 and did not purport to be anything else. In harmony with its intention to prohibit administrative refunds in cases within the scope of Section 611 Congress amended R. S. 3220 by Section 619(b) of the Revenue Act of 1928 to read that the Commissioner was authorized to make refunds "except as otherwise provided by law". R. S. 3220 relates solely to the authority of the Commissioner to make refunds. In harmony with its intention not to affect suits, Congress left untouched R. S. 3226 relating to suits for the recovery of taxes.

The Revenue Act of 1928 was approved at 8 A. M. on May 29, 1928. In the afternoon of the same day Congress passed Chapter 901, within re-enacted R. S. 3220

but omitted "except as otherwise provided by law". It seems fully as logical for the taxpayer to argue that by omitting this exception Congress impliedly repealed Section 611 of the Revenue Act of 1928 as it does for the respondent to argue that pre-existing law was impliedly repealed or amended by Section 611. It is the rule that where necessary to justice to do so the law will take account of parts of a day (*Louisville* v. *Portsmouth Saving Bank*, 104 U. S. 469).

While it is a rule stated by this court that the reports of Committees of Congress cannot be taken as giving Sections 607 and 611 a meaning not fairly within their words (see page 9 of this brief) yet it is submitted that there is nothing in these reports which is not perfectly consistent with a construction that Section 607 and 611 deal solely with administrative refunds made on claims filed subsequent to their enactment and have no effect on suits in court.

Reports of these Committees say nothing about suits in court. They refer to "refunds and credits" which, it must be presumed, were known to the Committees to be administrative acts of the Commissioner of Internal Revenue.

As above stated the words "no credit or refund shall be allowed" in Section 1106(a) of the 1926 Act were construed in *Thornhill Wagon Co.* v. *Noel*, 17 F. (2d) 407 and *Gove* v. *Nichols*, 23 F. (2d) 856, to relate solely to administrative refunds and when Congress used substantially the same language in the 1928 Act it must be presumed to have used it with full knowledge of and acquiescence in the construction theretofore placed upon those words by the courts (*Kepner* v. *United States*, 195 U. S. 100, 124).

Because the questions involved in the situation de-

scribed by Section 611 were purely legal and extremely technical Congress, which has frequently expressed its jealousy of administrative refunds, may well have thought that these legal questions should be determined by the courts.

IV.

IN ANY EVENT, SECTION 611 CANNOT AVAIL THE DEFENDANT AS A DEFENSE UNLESS HE CAN BRING HIMSELF WITHIN ITS TERMS. IN THE CASE AT BAR THE RECORD FAILS TO SHOW THAT THE COLLECTION WAS STAYED BY THE CLAIM IN ABATEMENT.

The Circuit Court of Appeals in its opinion in the case at bar says:

> "The title of the section under consideration (26 USCA 2611) can be referred to for the purpose of determining the proper interpretation of the section (*Church of Holy Trinity* v. *United States*, 143 U. S. 457, 462). The title of this section is 'Collections Stayed by Claim in Abatement'. Congress evidently intended to cover cases where actual delay had resulted from the filing of a claim in abatement."

With the above statement of the Circuit Court of Appeals, we are thoroughly in accord. Throughout the Revenue Act of 1928 Congress used headings to clarify the meaning of the sections and the heading of Section 611 is "Collections Stayed by Claim in Abatement". Assuming that "stayed" means merely a delay, we submit that the delay on the part of the Collector must have been due to the claim in abatement and not to some other reason, that is, in the words of the Circuit Court of Appeals in this case it must have "resulted from the filing of a claim in abatement." In other words the collection must have been "stayed by claim in abatement" and not by something else. The Treasury Department in its ruling G. C. M. 5665, published in C. B. VIII-1 at page 130, says:

> "The filing of a claim in abatement does not in and

of itself satisfy the provisions of that section (Section 611). Its provisions are applicable only if a timely assessment was made prior to June 2, 1924, and *if upon the filing of a claim in abatement, collection was stayed.* Here such a timely assessment was made, but collection of the tax became barred prior to the date of the filing of the claim. Consequently the legal right to enforce collection of the tax was never stayed, as the result of the claim being filed. The phrase 'collection * * * was stayed' as used in Section 611 clearing presupposes the legal right to collect, and the provisions of that section are not applicable when, if payment had been made at the time of the filing of the claim, it would have constituted an overpayment of the tax as defined by section 607." (Italics ours.)

In the case at bar there is no showing that the claim in abatement delayed the collection of the tax and consequently the defendant has not brought himself within Section 611.

Prior to the enactment of the Revenue Act of 1924 there was only one provision in the law for a stay upon the filing of an abatement claim and that was Paragraph 14 of Section 234 of the Revenue Act of 1918, which provided for the filing of a claim in abatement for the taxable year 1918 based on the fact that a substantial loss had been sustained arising from shrinkage in inventory, and further provided:

> "In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest."

This is the provision which was considered by this Court in the case of *United States* v. *John Barth Company*, 279 U. S. 370, and is quoted therein at pages 373 to 374. It could have no application to the case at

bar because it deals only with the year 1918, whereas the case at bar concerns the year 1917.

In the case at bar, there was no provision either of the law or of the regulations to prevent the Collector collecting the tax within the period of limitations. He might have done so at any time before or after the abatement claim was rejected.

It seems that the respondent must concede that after the claim in abatement was rejected it could have had no tendency to prevent the collection of the tax, nor did it necessarily prevent the collection of the tax while it was pending.

Article 261, of Regulations 33 (promulgated under the 1916 Act), Article 1032 of Regulations 45 (promulgated under the 1918 Act) and Article 1032 of Regulations 62 (promulgated under the 1921 Act) contained the following provision which was substantially the same in all of these regulations:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax, or make it any less the duty of the Collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

This Court has held in *Maryland Casualty Company* v. *The United States*, 251 U. S. 342, that a regulation which is not contrary to law has the force of law.

Notwithstanding the above regulation, the Circuit Court of Appeals for the Second Circuit in *Reeves* v. *Anderson*, ____ Fed. (2d) ____ (pending herein on certroiari) says:

> "Regardless of the eventual burden of proof on the issue the presumption is that the delay was caused by the claim; and there was no proof to meet it."

It is respectfully submitted that to raise a presumption of this kind against taxpayers seems to be resolving doubts against them rather than in their favor and to be invoking a presumption against them for which there is no warrant in the common or statutory law and contrary to the provision of the regulations that "a claim for abatement does not necessarily operate as a suspension of the collection of the tax".

So far as the case at bar is concerned we assume (but do not concede) that the word "stay" as used in Section 611 does not mean an enforced stay such as is within the scope of Section 234 of the Revenue Act of 1918, before mentioned, but that it merely means "delayed" as held by the Ninth Circuit in the case at bar.

Assuming that it means "delayed" there is nothing in the case at bar to show that the collection was "delayed by claim in abatement" and not by some other thing such as a waiver, a bond, oversight, negligence or by the indulgence of the Collector.

As a matter of fact, many cases exist in which claims in abatement were filed but waivers and not the abatement claims delayed the collection of the tax until after the limitation ran. Then the waivers were often either carelessly or through a misunderstanding of the law allowed to expire before collection was made and it is now sought to retain such collections by virtue of Section 611. One such case was that of *Gillespie* v. *Commissioner* (Board of Tax Appeals Docket 19832). It appears in that case from the testimony of the Assistant to the Collector at Oklahoma City that even in cases where abatement claims were pending if the Statute of Limitations was about to run that office wrote letters to the taxpayers demanding waivers, and as to its practice the witness testified therein at the bottom of page 615 and the top of page 616 of the record lin that case, as follows:

"Well, when your office wrote our letters demand-

ing waivers, and stating that unless waivers were returned, your office would immediately proceed with the collection of the tax, in such cases, if no waivers were returned, what was your custom—to immediately proceed with the collection of the tax?

"A. Yes, sir.

"Q. Regardless of whether claims in abatement were on file or not?

"A. Yes, sir.

"Q. Then, it was the waivers that stayed the collection of taxes, that caused you to withhold collection, the signing of waivers, was it not, in such cases?

"A. As a general practice it was; I do not know about this particular case."

From the above it appears that in that Collector's office unless waivers were signed they would proceed with the collection of the tax and that as a general practice it was waivers and not abatement claims which caused the Collector to withhold the collection of the taxes. In that case these waivers were allowed to expire before collection was attempted and when collection was thereafter made it was sought to retain it by virtue of Section 611. The Board of Tax Appeals (opinion not yet reported) disposed of the situation by saying that the burden of proof was on the taxpayer to show that the claim in abatement did not stay the collection of the taxes.

This is contrary to the reasoning of the Board's opinion in the case of *Farmers' Feed Company*, 10 B. T. A. 1069, which holds that the burden of proving exceptions to the running of the Statute of Limitations (in that case waivers) is upon the Commissioner of Internal Revenue. This holding has been followed by the Board in many other cases and was approved by the Circuit Court of Appeals for the Seventh Circuit in the case of *Chicago Railway Equipment Company* v. *Commissioner*, 39 F. (2d) 378.

If Section 611 has the effect contended for by the government, it is a matter of defense and the burden of proving it is on the defendant. Even in criminal cases where the proof must be beyond a reasonable doubt the burden of proving such defenses as insanity, provocation and self-defense is upon the defendant like the burden of proving all other defenses. (*U. S.* v. *Poland*, 251 U. S. 221; *Mercantile Mutual Insurance Co.* v. *Folsom*, 18 Wall. 237; *Great Northern R. R. Co.* v. *Hoosser*, 236 U. S. 702.)

When a plaintiff proves the date of filing the tax return and that more than five years elapsed before collection was made the plaintiff has made a prima facie case. If the defendant relies upon any exception to the operation of the Statute of Limitations, such as waivers or fraud, the burden is upon him to prove it.

In the early case of *Somerville* v. *Hamilton*, 4 Wheat. 230, this Court recognized and applied the general rule that an exception to the operation of the Statute of Limitations will not be presumed but must be proved by the party relying upon it.

As we have said, there are a great many other exceptions to the running of the Statute of Limitations besides Section 611 (if construed as contended for by the government) which the defendant might claim as a defense, such as a fraudulent return or waivers, but in tax practice it has always been considered and held that a fraudulent return or waivers were matters of defense to be proved by the defendant. Why make an exception to this rule for the facts embraced within Section 611?

In *United States* v. *Oregon Short Line R. Co.* 160 Fed. 536, the government was suing the railroad for a penalty. The railroad claimed that the plaintiff had not proved its case because it did not show the case was not within the excepting clause. The court said:

"Obviously it would be next to impossible for the

> government (plaintiff) to anticipate and by proof eliminate all the possible contingencies covered by the excepting clause. Even if it were held to be necessary for the plaintiff to plead against the exception, it might still be relieved from making proof, because it would thus plead a negative, and, further, because it pleads the absence of conditions, the evidence concerning which in many cases would be exclusively within the knowledge of the defendant."

The rules of common law pleading were interwoven with the rules of evidence. The following general principle is stated in Chitty on Pleading (16th ed. at page 318):

> "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption, but if there be an exception in a subsequent clause, that is a matter of defense and the other party must show it to exempt himself from the penalty."

In the case at bar the Collector claims that after the suit was filed and after the issue was joined an Act of Congress was passed exempting him from liability under certain exceptional circumstances. The burden therefore is upon him to bring himself within the exception.

Furthermore, in all fairness the burden of proof should be upon the Collector because he alone knows whether he delayed the collection of the tax because of the claim in abatement or because of some other reason. If he delayed it because of the abatement claim it is easy and convenient for him to prove this fact. This Court has repeatedly applied the rule that where a fact is peculiarly within the knowledge of a party to litigation the law for that reason casts upon him the burden of proving it. (*Selma R. & D. Co.* v. *United States*, 139 U. S. 560, and *United States* v. *Denver & Rio Grande R. Co.* 191 U. S. 84.)

It is further submitted that to hold that whether the

collection of a tax was stayed by the abatement claim is a question of fact to be proven by evidence, is in harmony with the rules underlying the requirement of due process of law and its attendant and indispensable hearing. Only by construing Section 611 to make provision for a hearing to determine this fact can the "due process" clause be satisfied. The citation of authority is hardly necessary to sustain this statement.

In the tax case of *Londoner* v. *Denver*, 210 U. S. 373, the Court said at page 386:

> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 426, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 171 *et seq.*, 41 L. ed. 369, 393, 17 Sup. Ct. Rep. 56.
>
> "It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the state. *Raymond* v. *Chicago Union Traction Co.* 207 U. S. 30, *ante*, 78, 23 Sup. Ct. Rep. 7. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it. It is not now necessary to consider the tenth assignment of error."

Nor should authority be necessary to sustain the proposition that if any question of fact be conclusively presumed against a litigant it is not due process of law because he is thereby deprived of a hearing on it.

V.

ASSUMING THAT STAYED MEANS DELAYED, NOT EVERY STAY BY A CLAIM IN ABATEMENT IS WITHIN THE SCOPE OF SECTION 611.

Section 611 does not expressly except any delay due to an abatement claim, yet if a claim in abatement was filed after the Statute of Limitations on the right to collect the tax had run and then delayed its collection, the Treasury Department itself concedes that Section 611 has no application. (G. C. M. 5665, VIII-1, p. 130.) Furthermore, the Honorable Solicitor General, in the days when he was a learned and distinguished District Judge in *Neuland* v. *Bowers*, 38 Fed. (2d) 842, so decided.

It is submitted that even in cases within the scope of Section 611 (*i. e.*, where refund claims were filed after its enactment) *that section should not be held applicable unless the claim for abatement caused the collection of the taxes to be delayed until after the Statute of Limitations had run.*

In *Burden Smith & Co.* v. *United States*, 32 F. (2d) 830, the court said at page 831:

> "There is apparently no logical or equitable reason for extending the time in all cases in which a claim in abatement was filed and there was a stay, without regard to the length of the stay."

Suppose a Collector had four years before the limitation expired to collect the tax from the date the taxpayer filed an abatement claim and this claim was rejected six months after it was filed leaving a period of three and one-half years in which to collect the tax, but the Collector did nothing because the case become lost in the thousands on his books. Although the government contends it is, we submit that Section 611 is not applicable to such a case.

No claim in abatement could possibly operate to delay

the collection of taxes any longer than a reasonable period after its rejection. In the case at bar the Statute of Limitations did not run on the Collector's right to make collection until March 22, 1923. The sixth paragraph of the stipulation shows that the claim in abatement was rejected on December 27, 1922. After the rejection of this claim, the Collector had three months, lacking five days, in which to collect the taxes before the Statute of Limitations on their collection had run. He did not attempt to collect them until November 19, 1924, or one year, ten months and 22 days after the rejection of the abatement claim, although he had a reasonable time after its rejection and before the expiration of the Statute of Limitations within which to make collection:

Some of those courts which have sustained the government in its view of Section 611 have said that it was intended to apply:

> "to those cases where the taxpayer by filing a plea in abatement had succeeded in delaying the case over the period of limitations and then sought to take advantage of the favor that had been granted him."

The case at bar is not such a case.

VI.

SECTIONS 250 (d) OF THE REVENUE ACT OF 1921 AND 277 (a) (2) OF THE REVENUE ACT OF 1924 EXTINGUISHED THE LIABILITY FOR TAXES FOR THE YEAR 1917 UPON THE EXPIRATION OF FIVE YEARS FROM THE FILING OF THE 1917 RETURN.

Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265) provides in part as follows:

> "The amount of income, excess profits, or war profits taxes due under any return * * * made under prior income excess profits, or war profits tax acts * * * shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and col-

lection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act, or under prior income, excess profits, or war profits tax acts * * * shall be begun after the expiration of five years after the date when such return was filed."

The above provision was before this Court in the case of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, and in *Russell* v. *United States*, 278 U. S. 181, Section 277 (a) (2) of the Revenue Act of 1924 (43 Stat. 299) was construed.

In *Wood* v. *Carpenter*, 101 U. S. 135, the court said at page 139:

> "Statutes of Limitation are vital to the welfare of society and are favored in the law. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation."

With reference to Section 250 (d) of the Revenue Act of 1921, when it was offered by the Ways and Means Committee Mr. Hawley, speaking for the Committee, said (Congressional Record, Vol. 61, page 5201):

> "A great many business transactions are suspended and are not consummated for the reason that the person intending to buy says: 'What liabilities are there on this property?' And, among others, there is stated to be a certain amount of tax in dispute. Men do not like to buy property, especially when the amount of tax in dispute is large. Many very important transactions have been lost, and this will open up the way to their settlement."

The construction of general Statutes of Limitations by the old common law as merely barring the remedy and not extinguishing the liability has lead to very unsatisfactory results. If a statute was a mere bar of the remedy by voluntarily making even a partial payment after it had run one was held to have waived its bar (*Cross* v. *Allen*, 141 U. S. 528) and a multitude of other claims of

waiver arose. For a long time the Treasury Department claimed that the filing of an amended return was a waiver of the statute.

In *Davis* v. *Mills*, 194 U. S. 450, at page 454, this Court said:

> "It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. *But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued.* The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. *The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.*" (Italics ours.)

See also *The Harrisburg*, 119 U. S. 199, and particularly *William Danzer & Co.* v. *Gulf Railroad Co.*, 268 U. S. 633 and authorities therein cited.

The general rule of law that a liability not grounded on contract or existing at common law but founded entirely on a statute, takes the Statute of Limitations with it as a part of the liability and when the limitation has run the liability is gone, is alone sufficient to establish this contention. (37 Corpus Juris, Section 51, page 732; 17 Ruling Case Law, Section 318, page 952; Wood, Limi-

tation of Actions, 2nd ed. page 35; Buswell, Limitations, Section 351.) It has been suggested that if the limitation is contained in a subsequent statute that rule does not apply, but this Court, in *Davis* v. *Mills*, 194 U. S. 450, at page 454, disposed of that contention in the quotation heretofore set forth in which it said:

> "The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

Taxes are within the above rule because, as said by this Court in *Meriwether* v. *Garrett*, 102 U. S. 472, at p. 513:

> "Taxes are not debts. Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government or for some special purpose authorized by it."

Taxes are solely created by statute and in the absence of a statutory liability for them no liability exists. Being purely statutory creations a special statutory limitation on their collection is within the now firmly established rule that when limitations on the enforcement of statutory liabilities expire the liability expires with them.

Furthermore, the various sections of the Revenue Act dealing with limitations are in *pari materia* and the intent of Congress must be ascertained by considering them together. This rule has been frequently stated by this Court and it has been applied in construing Revenue laws. (*Converse* v. *United States*, 21 How. 436, and see *United States* v. *Ewing*, 237 U. S. 197, 200; 25 R. C. L. Section 288, page 1064.) In construing Section 250 (d) with respect to waivers it was applied by the Court of Appeals for the District of Columbia in *Joy Floral Company* v. *Commissioner of Internal Revenue*, 29 F. (2d) 865, wherein the court quoted Chief Justice Marshall.

A consideration of the provisions of the various Revenue laws dealing with this subject makes it clear beyond a doubt that Congress intended to extinguish the liability.

By Section 1106 (a) of the Revenue Act of 1926, (44 Stat. 113) Congress provided in part that the bar of the Statute of Limitations should extinguish the liability. The legislative history set forth in this brief on pages 34 to 40 conclusively shows that Congress considered it to be merely declaratory of pre-existing law.

Section 250 (d) of the Revenue Act of 1921 has been construed not only to bar the remedy but to extinguish the liability in *Bashara* v. *Hopkins*, 290 Fed. 592 (Aff'd. 295 Fed. 319; Certiorari denied 265 U. S. 584), *Citizens Bank* v. *Miller Link Lumber Company*, 16 Fed. (2d) 163, and in *United States* v. *John Barth Company*, 27 Fed. (2d) 782 (reversed on other grounds in 279 U. S. 370). The only construction to the contrary which we have been able to find was that in the case of *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, which the Ways and Means Committee in its report stated was contrary to the rule expressed by this Court in *Graham* v. *Du Pont*, 262 U. S. 234. The reversal of the decision in the Toxaway Mills case by this Court in 273 U. S. 781, amounted to a decision that the Statute extinguished the liability.

As a matter of actual practice Section 250 (d) did not effectually bar the remedy because the Collector of Internal Revenue could issue a distraint warrant and collect the tax after the Statute of Limitations had run. The taxpayer could not prevent him by injunction. The substantial thing which the Statute of Limitations gave the taxpayer was an affirmative action to recover the tax after its payment. This is not true of Statutes of Limitations which merely bar the remedy. They cannot be made the basis of an affirmative action. Under those

statutes it seems that if the debtor pays the debt the creditor can keep it.

Section 250 (d) of the Revenue Act of 1921 is not a general Statute of Limitation but is a special Statute contained in a taxing act and an integral part of the Revenue laws and is, therefore, within the rule laid down in *William Danzer & Co., Inc.* v. *Gulf & S. I. R. Co.* 268 U. S. 633; *Morgan's Louisiana & Texas Railroad & S. S. Co.* v. *Cooke,* 273 U. S. 656; and *Peninsula Produce Exchange* v. *New York P. & N. R. R. Co.* 152 Md. 594, 137 Atl. 350; Aff'd. 275 U. S. 599.

It has been setled that the principle announced in these cases is equally applicable to the government—that is to say, the United States may set up against itself a statute of limitations in such language as to extinguish absolutely its right after the expiration of the period fixed. See *United States* v. *Chandler-Dunbar Company,* 309 U. S. 447; *Winona & St. Peter Railroad Co.* v. *United States,* 165 U. S. 483; and *United States* v. *Jones,* 218 Fed. 273.

In *Russell* v. *United States,* 278 U. S. 181, this Court said that the taxpayers "would be *free from liability under the five year limitation* in the Act of 1918, continued by the Act of 1921". And again that the construction of Section 278 contended for by the government "would extend for some five years a liability which had almost expired".

Another distinction between general statutes of limitation and special statutes of limitation contained in a taxing act is that general statutes of limitation are construed strongly in favor of the government, whereas special statutes of limitation contained in a taxing act are construed liberally in favor of the taxpayer. This distinction was recognized by this Court in *United States* v.

Updike, 281 U. S. 489, at page 496, and particularly in *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, at page 349.

Since the Statute of Limitations contained in Section 250 (d) of the Revenue Act of 1921 extinguished the taxpayer's liability and the provision to this effect contained in Section 1106 (a) of the Revenue Act of 1926 was merely declaratory of pre-existing law, there is no basis for the distinction which the Court of Claims draws between payments made prior to the enactment of the Revenue Act of 1926 and payments made thereafter. It has made this distinction in the case of *Taft Woolen Company*, 38 Fed. (2d) 699, on the one hand, and *Wyman Partridge Company*, 41 Fed. (2d) 886, on the other, all of which are now pending herein on certiorari. So far as we are aware no other Court has made this distinction.

VII.

SECTION 611 IMPOSES NO TAX NOR DOES IT RATIFY THE COLLECTION OF A TAX.

Two cases which have been misapprehended by those courts which have decided the question herein involved in favor of the government are the cases of *United States* v. *Heinszen & Co.* 206 U. S. 370, and *Rafferty* v. *Smith, Bell & Co.* 257 U. S. 226.

As pointed out in the petition for the writ, the decision in the Heinszen case was made over the dissent of two Justices, one did not participate and Mr. Justice Harlan in his specially concurring opinion seems to intimate that he might have thought otherwise had the suit been brought against the Collector and not against the United States.

The majority opinion in the prior case of *De Lima* v.

Bidwell, 182 U. S. 199, had said that such an act would be beyond the power of Congress.

It is respectfully submitted that the Heinszen and Rafferty cases have no bearing on the case at bar.

In those cases there was a clear and explicit ratification of the collection of the duties in "words from which there was no escape." It was sustained in the Heinszen case on the theory that it was "but an exercise of the conceded power dependant upon the law of agency to ratify an act done on behalf of the United States, which the United States could have originally authorized".

If the United States could have originally authorized the collection of taxes from people in the situation set forth in Section 611, which we deny for the reasons hereinafter stated, then if Section 611 is a ratification of the act of the Collector in collecting the taxes, it makes the collection legal and these cases relied upon by the government apply.

It is submitted that when the rules for the construction of tax statutes are applied to Section 611 and even without invoking their application the opinion of the court in *Bessemer Coal & Coke Company* v. *Heiner*, 39 Fed. (2d) 492, in which it is said:

> "There are no words in the Act which can clearly be construed as a ratification of the collection of a tax which was barred by the Statute of Limitations at the time it was paid"

is eminently sound.

In the Heinszen and Rafferty cases it was not even argued and it could not have been argued that the Acts of Congress there involved did not ratify the collection. They expressed an intention so to do "in words from which there was no escape". In the Heinszen case the Act of Congress provided:

> "That the tariff duties * * *, are hereby legalized

and ratified, and the collection of all such duties * * * is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

The ratifying Act in the Smith, Bell & Company case provided that:

"The taxes imposed by the Philippine legislature * * * are legalized and ratified, and the collection of all such taxes made under or by authority of such Act * * * is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

The history of those cases discloses that Congress passed several Acts before it passed one sufficiently explicit to accomplish ratification, and even after the decision in the Heinszen and Rafferty cases this Court in *McLeod* v. *United States*, 229 U. S. 416, refused to apply it to a situation not within "the exact and literal meaning of the words".

It will be a far-fetched construction and will be casting all fixed rules for the construction of tax laws to the winds to say that Section 611 ratified the collection of a tax. It merely declares that under the circumstances stated the collection shall not be an overpayment under the provisions of Section 607 and Section 607 purports to ratify nothing. Had Congress desired to ratify anything it could easily have adopted words sufficiently explicit to do so. Indeed, it is presumed to have passed this legislation with a knowledge of the prior decisions of this Court and it is presumed to have been cognizant of the necessity for explicit ratification before it would be held to have ratified any Act which was illegal at the time it was done. Therefore the Heinszen and Rafferty cases are not in point.

Indeed, the reason all doubts are to be resolved in favor of the citizen and against the government in tax matters is that Congress is always at hand to amend the law and if it is not unequivocal and specific enough Congress can make it more specific if it desires to do so.

Manifestly, Section 607 imposes no tax, and Section 611 imposes no tax, because while it applies to payments voluntarily made within one year after its enactment, yet it does not purport to compel anyone to pay, which would have been the case had it imposed a tax.

We do not think respondent will contend that Sections 607 and 611 impose a tax. If he contends that they ratify the collection of a tax certainly no support for this contention can be spelled out of the exact and literal meaning of the words and this Court in the past has repeatedly refused to imply a ratification from much stronger language.

If respondent, finding no support in "the exact and literal meaning of the words" of Section 611 for either of these contentions does not make them then he will be forced to claim that Section 611 merely provides that monies illegally collected shall be retained in the Treasury under the circumstances specified. It seems that this is the utmost extent to which a construction of Section 611 can go. Indeed, from the report of the House Conferees who were responsible for Section 611, which report is set out at page 11 of this brief, it seems that *all they intended to do by it and all they thought it did was to make a "prohibition upon refunds".*

If that is all it does then the reversal of this judgment was erroneous because no error occurred up to and including the time of its rendition. Petitioners had a personal judgment against the Collector for his illegal act and no reason appears in this record (no certificate of

probable cause) why they could not have collected it from him even if the United States does keep the fruits of his illegal exaction. The matter is purely a personal matter between petitioners and the Collector and as said in *Sage* v. *United States*, 250 U. S. 33, at page 37:

> "At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself."

In the case at bar it does not appear that the United States has any kind of interest in this judgment. So far as the record is concerned the United States is a total stranger to it.

Even in cases where certificates of probable cause are issued they do not render the judgment invalid but merely concern the source from which it is or is not collectible.

But if Section 611 imposes no tax and ratifies the collection of no tax but merely provides that monies illegally collected shall be retained by the United States then it is obviously unconstitutional because it simply confiscates such monies and appropriates private property to public use without just compensation and without due process of law.

The title to monies collected by duress has never passed out of the plaintiff any more than the title to land passes out of one from whom a deed purporting to convey it is taken by duress and a provision that such monies shall be retained in effect provides "such monies are hereby confiscated".

VIII.

EVERY COURT WHICH HAS CONSIDERED THE QUESTION TO DATE HAS DECIDED THAT CONGRESS HAVING EXTINGUISHED A LIABILITY HAS NO POWER TO REVIVE THE SAME.

So far as we have been able to find, every court to which the question has been presented has held that where Congress has extinguished a tax liability it has no power to revive the liability. These decisions are the decision of the Third Circuit in the case of *Dobbins* v. *Commissioner*, 31 F. (2d) 935; the decision of the Seventh Circuit in *United States* v. *John Barth Co.* 27 F. (2d) 782 (reversed on other grounds in 279 U. S. 370); of the Court of Claims in *Wyman, Partridge & Co.* v. *United States*, 41 F. (2d) 886; of the Supreme Court of Pennsylvania in *Wettengel* v. *Robinson*, 289 Pa. 525; 136 Atl. 673; also of several District Courts in the following decisions: *Pepsin Syrup Co.* v. *Schwanner*, 35 F. (2d) 197 (Ill.); *Southern Lumber Company* v. *United States*, ____ F. (2d) ____ (D. C. Arkansas), and of the Board of Tax Appeals in *Peerless Woolen Mills*, 13 B. T. A. 1119.

The courts are unanimous and no court has dissented from this proposition. The solitary judge to express dissent is Judge Littleton in his specially concurring opinion in the case of *Wyman, Partridge & Co.* v. *United States*, 41 F. (2d) 886, wherein he says that the limitations of the due process clause which exist between individuals do not exist in matters of taxation. This is contrary to the view expressed by him when he was chairman of the Board of Tax Appeals in *Peerless Woolen Mills*, 13 B. T. A. 1119, at pages 1131 and 1132.

It is submitted that all the limitations of the due process clause applicable to individuals should be applicable to the government. The Constitution does not

contain any exception in favor of public officers. The Constitution would probably not have been adopted except for the assurance that the due process clause would be subsequently added. At the time it was adopted the people were democratic in thought. It was considered that public officers were public servants and for that reason should and would be subject to all the constitutional limitations which applied to the dealings of one of the masters of these public servants with another. It was never thought that in a government "of, by and for the people" the distinctions and precedents concerning the powers and sovereignty of a government which existed in a monarchial country where public officers were public masters and not public servants would be applied to the construction of our Constitution. If it had been so thought it would not have been adopted. The people having recently suffered from the encroachments by way of taxation of the King's government wanted protection against the new one they were setting up.

If Section 611 is construed as contended for by the government, when all technical distinctions are brushed aside the result will be to go back for years and reimpose a liability which had been extinguished by legislation. This situation was not present in the Heinszen and Rafferty cases. In those cases no liability had been extinguished and was sought to be again reimposed, and in this respect those cases are distinguishable from the case at bar and the rule laid down in *William Danzer & Co. Inc.* v. *Gulf & Ship Island R. R. Co.* 268 U. S. 633 *and the cases therein cited.*

A rule applicable in cases where the remedy is not merely barred but the liability extinguished is stated in the textbooks and is expressed in the article on Limitation of Actions in 17 R. C. L. Section 15 at page 674, as follows:

"One who has become released from a demand by

the operation of the statute of limitations is protected against its revival by a change in the limitation law, the defense in such case being considered a vested right or property, which cannot be taken away by legislation, or even by the action of a constitutional convention, attempting to revive the cause of action either by repeal of the statute or by affirmative act."

IX.

IF SECTION 611 IS CONSTRUED AS CONTENDED FOR BY THE GOVERNMENT IT FURTHER VIOLATES THE FIFTH AMENDMENT BECAUSE IT IS UNREASONABLE AND ARBITRARY.

Section 611 is admittedly ineffective and inapplicable if we substitute in it the words "claim for credit" for the words "claim in abatement". The Treasury Department in G. C. M. 6296, published in Internal Revenue Cumulative Bulletin VIII-2, at page 152, concedes that it has no application to cases in which claims for credit were filed.

Claims for credit and claims in abatement were handled in and operated in precisely the same way. The only distinction between them was the square in which the taxpayer made an "X". In order that the Court may visualize this argument the form used for these claims is contained at the end of this brief at page 72.

If your Honors will look at this you will observe that it becomes a claim for credit or a claim in abatement according to the square in which the taxpayer places an "X". So far as any possible delay of the collection of the tax is concerned it must be admitted by the government that a claim for credit operated in precisely the same way as a claim in abatement. If anything, the morals of the situation is stronger in cases where the abatement claim was filed because in such cases the taxpayer usually had a ground to contest the tax, whereas

in cases of credit claims he was not contesting the tax but was claiming that an overpayment for another year should be applied against an admitted tax liability.

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, this Court said at page 240:

> "A classification for purposes of taxation must rest on some reasonable distinction".

Have we come to a time in this country when whether thousands of dollars are to be given to one man or withheld from another under our tax laws may under our Constitution depend upon the square in which he puts an "X"? Is a classification depending upon an "X" reasonable? If so, what kind of classification is unreasonable?

In *Nichols* v. *Coolidge*, 274 U. S. 531, this Court said at page 542:

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment".

If Congress had attempted to impose for the first time a tax limited to the special class of taxpayers who are within and based upon distinctions as insubstantial as those made by Section 611 it can hardly be believed that it would be sustained. The observation of this Court in *Forbes Boat Line* v. *Commissioners*, 258 U. S. 338 at page 339 is applicable:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of *United States* v. *Heinszen & Co.* 206 U. S. 370; (*Rafferty* v. *Smith, Bell & Company*, 275 U. S. 226), which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be

> imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. *Wagner* v. *Baltimore*, 239 U. S. 207, 216, 217. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act".

Under the respondent's construction of Section 611 people who filed abatement claims and by one means or another succeeded in delaying the collection of the tax until the enactment of the Revenue Act of 1928 are not compelled to pay. In other words, the longer a taxpayer succeeded in delaying the collection of the tax the more is he favored. The taxpayer who was prompt and paid quickly is sought to be penalized. The taxpayer who skulked and delayed is rewarded.

The taxpayer who filed a claim in abatement and who was within the respondent's construction of Section 611 but who paid the tax and brought a court action and recovered before the enactment of the Revenue Act of 1928 may keep the money, and finally, even where the exact situation prescribed in Section 611 does exist, the taxpayer who pays more than one year after the enactment of the Revenue Act of 1928 may recover his money.

The ex-*post facto* character of Section 611 and its impairment of the Collector's implied contract to repay the money are not to be left out of consideration in determining the question of reasonableness. There may be things, any one of which standing alone would not operate to make a law invalid but the combination may be such as to render it arbitrary and capricious.

In *Forster* v. *Forster*, 129 Mass. 559, the court, speaking through Chief Justice Grey, later an associate Justice of this court, held a statute unconstitutional which

made a far more reasonable classification than does the one in the case at bar.

Section 611 is further objectionable because it denies to taxpayers equal protection of the laws and as said in *United States* v. *Yount*, 267 Fed. at page 861:

> "It seems reasonably clear that the 'due process of law' provisions of the Fifth Amendment is broad enough in its scope and purpose to include 'the equal protection of the laws' which no State may deny to any person under the provisions of the Fourteenth Amendment."

No case has gone so far as to hold that Congress may deprive a party of all remedy for a wrongful act. The Heinszen and Rafferty cases did not so hold. In those cases the act was ratified and expressly made legal and consequently there was no wrong for which any remedy could be sought.

It is beside the point to say that Congress may alter or modify a remedy or substitute an administrative for a judicial remedy. No remedy is here involved. As said by the court in *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, at page 384:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury."

In the case at bar at the time this suit was brought the petitioners had an acknowledged claim against the respondent and a clear right to recover a judgment against him.

This court has also said:

> "Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or *deprive one of a vested*

property right. If the changing or repealing statute *leaves the parties a substantial remedy the legislature does not exceed its authority.* Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. * * * The right to compensation was a vested property right." (Italics ours) *Ettor* v. *Tacoma,* 228 U. S. at p. 155, 156 and 158; *Smallwood* v. *Gallardo,* 275 U. S. 56; 48 S. Ct. 23.

In *Pritchard* v. *Norton,* 106 U. S. 132, this court said:

"A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law it is not competent for the legislature to take it away."

In *Gilbert* v. *Ackerman,* 159 N. Y. 118, the Court of Appeals of the State of New York stated the rule as follows:

"The right possessed by a person of enforcing his claim against another is property and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law."

In the case of *Angle* v. *Chicago etc. Railway Company,* 151 U. S. 1, 19, this court said:

"A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."

It seems obvious that if an individual should rob your Honor upon the steps of the capitol the legislature could not pass an act granting him immunity. In the case at bar the Collector illegally and wrongfully took the plaintiff's property. It is said that an act has been passed granting him immunity. If so the act can only be sustained by making distinctions in tax cases which are not applicable to other cases. The necessity of the situation does not demand that any such distinction be made. Such distinctions were not contemplated when the Constitution was adopted and revenue may be easily raised in other ways without grafting such distinctions upon the law.

For all or any of the foregoing reasons and many more which will doubtless occur to your Honors out of the abundance of your experience and the fullness of your wisdom the decision of the Circuit Court of Appeals should be reversed and the decision of the District Court affirmed.

All of which is respectfully submitted.

JOHN E. HUGHES,
Counsel for Petitioners.

Chicago, November 5, 1930.

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

CLAIM FOR

[illegible] DEPARTMENT
[illegible] Service
Form [illegible]
Computer Control U. S.
January [illegible]

☐ ABATEMENT OF TAX ASSESSED
☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
☐ REFUND OF TAXES ILLEGALLY COLLECTED
☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

COLLECTOR'S NOTATION
District
Account number
Date received
Stamp here
Collector of Internal Revenue

State of _____ } ss:
County of _____ }

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit
Stamp here

TYPE OR PRINT

_____
(Name of taxpayer or purchaser of stamps.)

_____
(Residence—give street and number as well as city or town and State.)

_____
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From:	19
To:	19

1. Business in which engaged _____
2. Character of assessment or tax _____
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased _____ $
4. Reduction of Tax Liability requested (Income and Profits Tax) _____ $
5. Amount to be abated _____ $
6. Amount to be refunded (or such greater amount as is legally refundable) _____ $
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) _____
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed _____
9. District in which unpaid assessment appears _____
10. Amount of overpayment claimed as credit _____ $
11. Unpaid assessment against which credit is asked; period from _____ to _____ $

Deponent verily believes that this application should be allowed for the following reasons:

_____

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this _____ day of _____, 19__

Signed:

_____

_____
(Title.)

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No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1928

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLER FRANCIS OIL COMPANY, A COPARTNERSHIP, PETITIONERS

v.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 589

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, Doing Business Under the Firm Name of Millie Francis Oil Company, a Copartnership, petitioners

v.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE of the United States of America, in and for the Sixth Collection District, State of California

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition.

The question is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (quoted on pp. 4-5 of the petition for certiorari), deprived the petitioner of the defense of the statute of limitations and if so whether it offends against the due process clause

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of the Constitution. The pertinent dates are as follows (R. 8, 11–15):

March 22, 1918, return for 1917 was filed.

January, 1920, additional assessment made.

February 11, 1920, claim in abatement filed.

December 27, 1922, claim in abatement rejected.

March 22, 1923, expiration of five-year period for collection of tax.

November 19, 1924, notice and demand for payment of tax made.

November 29, 1924, and December 3, 1924, tax collected.

December 23, 1927, suit commenced.

The Circuit Court of Appeals, in an opinion (R. 31) reported in 35 F. (2d) 586, held that Section 611 of the Revenue Act of 1928 barred recovery in this case and accordingly reversed the judgment of the District Court, which was rendered without opinion (R. 15–18). This decision presents conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Burden, Smith & Co.*, 33 F. (2d) 229.

The question of the proper interpretation of Section 611 has been before several of the District Courts and there has been much diversity of opinion. To the cases listed in the petition (p. 6) should be added the following recent decisions of the Court of Claims supporting the position of the Government: *Oak Worsted Mills* v. *United States*, decided December 2, 1929, and *Gotham Can Co.* v. *United States* decided January

20, 1930. While we think it is immaterial, these two cases differ from the instant case in that the claims in abatement in those cases seem to have been rejected after the running of the statute of limitations.

Other cases involving the question are pending in the various District Courts, and it is of general importance. Although it is believed that the decision of the court below was right and that the interpretation which has been given the statute is in accord with the congressional purpose as disclosed by the legislative history, the question is one which should be determined by this Court.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,

SEWALL KEY,

J. LOUIS MONARCH,
Special Assistants to the Attorney General.

FEBRUARY, 1930.

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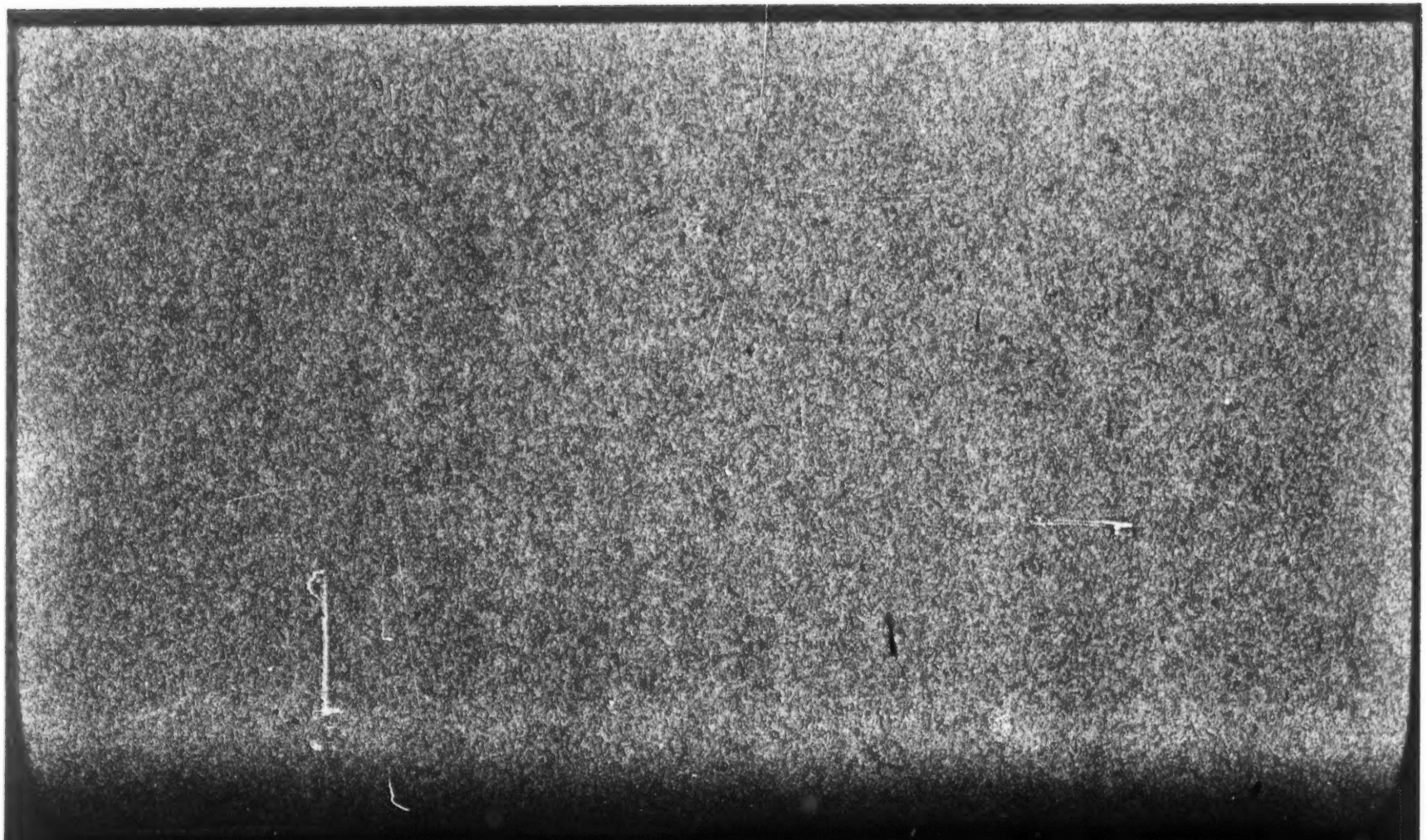

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No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1930

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A COPARTNERSHIP, PETITIONERS

v.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 36

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The judgment of the United States District Court for the Southern District of California (R. 17) was entered without opinion other than brief conclusions of law (R. 16). The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 31) is reported in 35 F. (2d) 586.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 4, 1929. (R. 35.) Petition for certiorari was filed January 20, 1930. Certiorari was granted March 3, 1930 (R. 39), 281 U. S. 708. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a tax is assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory time therefor has expired, does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid?

This is the broad general question involved herein and in thirteen cases which are to be argued immediately following this case. If the broad general question should be answered in the affirmative, then in this particular case the questions arise whether the fact that this is a suit against a Collector of Internal Revenue, or the fact that there was a period after rejection of the claim in abatement and before the statute of limitation against collection had run within which collection might be made, or the fact that suit was entered before the enactment of Section 611 of the Revenue Act of 1928, leads to a different result.

STATUTES INVOLVED

The statutes involved will be found in Appendix A of this brief, pp. 38–44, *infra*.

STATEMENT

The petitioners brought this suit to recover certain amounts paid to the respondent consisting of additional excess-profits taxes for the year 1917 in the amount of $7,034.71 and interest thereon in the amount of $2,004.69. (R. 5.) The case was tried in the District Court upon a stipulation of facts. (R. 11–14.)

The petitioners, engaged in business as copartners under the firm name of Millie-Francis Oil Company, filed their partnership income and partnership excess-profits tax returns for the year 1917 on March 22, 1918, and paid the taxes due thereunder. (R. 11.) An assessment of additional taxes for 1917 against the petitioners was made by the Commissioner of Internal Revenue on the January, 1920, list. (R. 12.) The petitioners filed a claim for abatement of this assessment on February 11, 1920, and the claim was rejected by the Commissioner on December 27, 1922. (R. 12.) The five-year period for collection of the 1917 taxes of the petitioners expired March 22, 1923. The respondent on November 19, 1924, served a notice and demand on the petitioners for the payment of the additional tax with interest and threatened to enforce such payment by distraint and sale. (R. 12.) The petitioners paid the additional tax and interest

under protest in two installments on November 29, 1924, and December 3, 1924. (R. 12.) Thereafter, on September 25, 1925, they filed a claim for refund of the whole of the amount paid on the ground that it was collected after the statute of limitations against collection had run. This claim was rejected by the Commissioner of Internal Revenue on January 13, 1926. (R. 12–13.) The Revenue Act of 1926 was enacted February 26, 1926. Petitioners entered suit herein on December 23, 1927. (R. 8.) The Revenue Act of 1928 was enacted May 29, 1928.

No waiver extending time for assessment or collection under Section 250 (d) of the Revenue Act of 1921 is involved. (R. 13.)

The validity of the assessment is not questioned. The trial court found "that if the taxes were collectible, the proper amount of tax was assessed and paid." (R. 16.)

The petitioners were given judgment by the trial court. (R. 17.) This judgment was reversed by the Circuit Court of Appeals. (R. 35.)

SUMMARY OF ARGUMENT

At the time the taxes herein involved were collected such collection was barred by the statute of limitations. At the time this suit was entered (which was prior to the enactment of the Revenue Act of 1928) the respondent was without a defense, unless Section 1106 (a) of the Revenue Act of 1926 constituted a defense. It is the respondent's position that Section 611 of the Revenue Act of

1928, enacted before entry of judgment in the District Court, constituted a defense to the action, and that the judgment of the Circuit Court of Appeals in favor of the respondent should be affirmed.

The facts of the instant case bring it within the provisions of Section 611. The legislative history of the section and the reasons for its enactment show that it was intended to prevent recovery of amounts collected after the running of the statute of limitations where the assessment was timely, a claim in abatement asking for further consideration filed, and the collection stayed. The word "stayed" as used in the section does not contemplate a mandatory or judicial stay as a result of which collection was prohibited. To give the word such meaning would be to deprive the section of any substantial effect and would be contrary to the purpose underlying its enactment. The word "stayed" refers to the delay in collection which results from the consideration of the claim in abatement. The fact that there still remained some time to collect after rejection of the claim in abatement does not affect the applicability of the section as a defense.

Section 611 is not merely a rule for the administrative guidance of the Commissioner. If this were its sole purpose a situation would result where as a prerequisite to the right to sue an application must be made to the Commissioner for a refund which he could not grant. Moreover, it would

defeat the purpose of the enactment, which was to permit the retention of the amounts collected. The provisions of the section are broad enough to carry out the legislative intent and prevent the right of a recovery. They apply to actions against a collector as well as those against the United States.

The legislation is not unconstitutional. It does not purport to defeat the right of recovery of taxes not properly owing but merely prevents recovery of amounts properly due except for the statute of limitations. Since the Government may specify the conditions on which it will be sued, it may modify or change statutes of limitation against itself. In so doing it does not violate the Fifth Amendment. The classification is not unreasonable.

ARGUMENT

Preliminary statement

The tax liability involved herein was for the calendar year 1917 and the petitioners' return was filed March 22, 1918. At that time there was no period of limitation on the collection of the tax. The Revenue Act of 1921, Section 250 (d), *infra*, p. 38, provided a five-year period of limitation for assessment and collection of taxes for the year 1917. Cf. *Boucers* v. *N. Y. & Albany Co.*, 273 U. S. 346. Assessment of the tax was timely, having been made in January, 1920. On November 29, 1924, and December 3, 1924, more than five years after the return was filed, the petitioners paid the amounts assessed under threat of distraint.

These payments were made after the enactment of the Revenue Act of 1924, but since assessment was made before that Act the additional period for collection provided therein did not apply (*Russell v. United States*, 278 U. S. 181), and collection was barred by the statute of limitations. Consequently, at the time petitioners entered suit in December, 1927, the respondent was without a defense, unless Section 1106 (a) of the Revenue Act of 1926 barred recovery, a question which has never been settled by this Court (see *Ellay Co.* v. *Bowers*, 25 F. (2d) 637, certiorari denied, 277 U. S. 606), and which need not be considered, as that section has been repealed as of the date of its enactment. Revenue Act of 1928, Section 612, *infra*, p. 43.

The case was tried in the District Court on December 28, 1928 (R. 15), after the effective date of the Act of 1928. On January 3, 1929, that court entered judgment for the petitioners for the amount paid, with interest. (R. 17.) The Circuit Court of Appeals held that Section 611 of the Revenue Act of 1928 barred recovery by the petitioners and reversed the judgment of the District Court.

The principal question is involved in the following cases now before this Court:

DECIDED IN FAVOR OF THE GOVERNMENT

Magee v. *United States*, No. 65 (C. Cls.).

Oak Worsted Mills v. *United States*, No. 104 (C. Cls.).

Taft Woolen Co. v. *United States*, No. 105 (C. Cls.).

Second National Bank of Saginaw, Trustee, v. *United States,* No. 323 (C. Cls.).

Boston Pressed Metal Co. v. *United States,* No. 337 (C. Cls.).

Reeves, Inc., v. *Anderson,* No. 463 (C. C. A. 2d).

Mascot Oil Co. v. *United States,* No. 490 (C. Cls.).

Roy & Titcomb, Inc., v. *United States,* No. 412 (C. Cls.).

American Glue Co. v. *United States,* No. 519 (D. Mass.).

Jennings v. *Anderson,* No. 529 (C. C. A. 2d).

DECIDED AGAINST THE GOVERNMENT

United States v. *Wyman, Partridge & Co.,* No. 416 [1] (C. Cls.).

Heiner v. *Erie Coal & Coke Co.,* No. 508 (C. C. A. 3d).

In addition to the above, the following cases involving the application of the section have been decided:

DECIDED IN FAVOR OF THE GOVERNMENT

Gotham Can Co. v. *United States,* 68 C. Cls. 749, 37 F. (2d) 793; petition for certiorari dismissed, 281 U. S. 706.

Huntley v. *Gile,* 32 F. (2d) 857 (C. C. A. 9th).

Wright & Taylor v. *Lucas,* 34 F. (2d) 328 (W. D. Ky.), aff'd, Nov. 10, 1930 (C. C. A. 6th).

[1] The court held with the Government on this question but decided against it on another ground.

L. H. Woodward Co. v. *Anderson*, 34 F. (2d) 709 (D. Utah.).

Regla Coal Co. v. *Bowers*, 37 F. (2d) 373 (S. D. N. Y.).

Rockland & Rockport Lime Corporation v. *Ham*, 38 F. (2d) 239 (D. Maine).

North American Creamery Co. v. *Willcuts*, 38 F. (2d) 483 (D. Minn.).

Pigott v. *Poe*, 41 F. (2d) 273 (W. D. Wash.)

Sterling Wholesale Grocery Co. v. *United States*, decided Oct. 16, 1930 (N. D. Ill.).

Wolf Safety Lamp Co. v. *United States*, decided Oct. 14, 1930 (S. D. N. Y.); Prentice-Hall Federal Tax Service, 1930, Vol. 2, par. 1839.

Parker v. *Routzahn*, decided Oct. 28, 1930 (N. D. Ohio); Prentice-Hall Federal Tax Service, 1930, Vol. 2, par. 1966.

DECIDED AGAINST THE GOVERNMENT

United States v. *Burden, Smith & Co.* 33 F. (2d) 229 (C. C. A. 5th).

Clinton Iron & Steel Co. v. *Heiner*, 30 F. (2d) 542 (W. D. Pa.).

Cutcheon v. *Rafferty*, 34 F. (2d) 708 (E. D. N. Y.).

Pepsin Syrup Co. v. *Schwaner*, 35 F. (2d) 197 (S. D. Ill.).

Sugarland Industries v. *Bass*, 36 F. (2d) 375 (W. D. Tex.).

Neuland v. *Bowers*, 38 F. (2d) 842 (S. D. N. Y.).

Diamond Alkali Co. v. *Heiner*, 39 F. (2d) 643 (W. D. Pa.).

Bessemer Coal & Coke Co. v. *Heiner*, 39 F. (2d) 492 (W. D. Pa.).

Southern Lumber Co. v. *United States* (W. D. Ark.) not yet reported, but will be found in Prentice-Hall Federal Tax Service, 1930, Vol. 1, par. 1386.

Illinois Kaolin Co. v. *United States*, unreported (N. D. Ill.).

National Carton Co. v. *Reinecke*, unreported (N. D. Ill.).

I

SECTION 611 OF THE REVENUE ACT OF 1928 BARS RECOVERY BY THE PETITIONERS UNDER THE FACTS OF THIS CASE

Section 607 of the Revenue Act of 1928 provides that any tax "assessed or paid * * * after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." Section 611 provides that if any tax "was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

In the instant case the sum sought to be recovered was assessed in January, 1920, within five

years of the return date and prior to June 2, 1924. A claim in abatement was filed without bond and collection was delayed until November and December, 1924. It is submitted that the facts bring the case squarely within Section 611 and that an examination of the legislative history of the section and the reasons underlying its enactment demonstrates that it was intended to bar recovery of amounts paid under circumstances such as those presented herein.

A. THE HISTORY OF SECTION 611 AND THE REASONS FOR ITS ENACTMENT SHOW THAT IT WAS THE LEGISLATIVE INTENT TO BAR RECOVERY OF AMOUNTS COLLECTED AFTER THE STATUTE OF LIMITATIONS HAD RUN, WHERE A CLAIM IN ABATEMENT WAS FILED AND COLLECTION STAYED

Section 250 (d) of the Revenue Act of 1921 required assessment of taxes for prior years to be made within five years after the return was filed and prohibited any suit or proceeding after that period for the collection of the tax. The Treasury Department held that taxes assessed within the five-year period could be collected by distraint at any time and that a suit in court was the only proceeding for collection that was barred after the five-year period. I. T. 1446, Cumulative Bulletin I–2 (July-Dec., 1922), p. 218. This being the position of the Treasury Department, the practice of delaying collection upon the filing of claims for abatement developed. Upon the filing of a claim for abatement the collection of any additional tax was deferred until the taxpayer could

have a hearing and an opportunity to present facts in opposition to the assessment. In a great many cases this practice delayed the collection until after the five-year period had expired. On February 21, 1927, this Court rendered its decision in *Bowers* v. *N. Y. & Albany Co., supra,* holding that collection by distraint was a "proceeding" within the meaning of Section 250 (d) of the Revenue Act of 1921 and that such collection was barred thereby after five years. This case finally established that the view of the Treasury Department was erroneous and that a great many of the collections theretofore made had been barred.

Before this decision and before enactment of the Revenue Act of 1926, the Court of Claims rendered a decision in *Toxaway Mills* v. *United States,* 61 C. Cls. 363, which caused confusion and uncertainty as to the effect of the statute of limitations. In that case the court held *inter alia* that if the tax had been collected after the statutory period the taxpayer must nevertheless prove that there had been an overpayment on the merits, disregarding the limitations, on the theory that the statute of limitations did not extinguish the liability but merely barred the remedy. The case was later reversed on confession of error. *Toxaway Mills* v. *United States,* 273 U. S. 781. Before its reversal, the decision of the Court of Claims was brought to the attention of the Committee in Congress then engaged in drafting the Revenue Bill of 1926, and Section 1106 (a) of the Revenue Act of 1926 was

enacted for the purpose of clarifying the situation. The Conference Report, House Report No. 356, 69th Congress, 1st Session, explains the amendment as follows (p. 55):

> Amendment No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *United States*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court (See, Taft, C. J., in *Graham* v. *du Pont*, 262 U. S. 234, 256, 258). The House recedes with an amendment making certain that the provision does not require a refund to a taxpayer for any year (even though the statute has run against the Government) unless he had in fact overpaid his tax for that year, nor require a taxpayer to pay an additional tax for any year (even though the statute has run against his claim or suit for refund) unless he had in fact underpaid his tax for that year. Obviously, this section does not apply in the case of fraud or in the case of a waiver.

But the provisions of Section 1106 (a) failed to resolve the doubts concerning the effect of the running of the statute. Cf. Senate Report No. 960, 70th Congress, 1st Session, p. 41, Appendix B, *infra*,

p. 46. While it provided that the bar of the statute against the United States and against the taxpayer should not only operate to bar the remedy but should extinguish the liability, it also provided that no credit or refund should be allowed unless the taxpayer had overpaid the tax. The same uncertainty existed as to a taxpayer's right to recover taxes paid out of time.

The situation was clarified by the Revenue Act of 1928. By Section 612 of that Act, Section 1106 (a) of the Revenue Act of 1926 was repealed as of the date of its enactment and Sections 607, 608, and 609 were substituted for the purpose of settling at rest the right of recovery where taxes were collected after the period of limitation had run. At the same time Section 611 of the Revenue Act of 1928 was enacted for the express purpose of retaining in the Treasury amounts collected after the period of limitation when collection was delayed by reason of the consideration of a claim in abatement.

The purpose of the enactment of the above sections of the Revenue Act of 1928 is made clear by an examination of the Committee Reports in connection with the Bill. These reports will be found in Appendix B, *infra*, pp. 45-51. With respect to Section 607 they show (*infra*, p. 46) that that section and its companion Sections 608, 609, and 610 were enacted "to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the as-

assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund." The following language from the Report of the Committee on Ways and Means (*infra*, p. 48) shows the reasons for and purposes of Section 611:

> * * * taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. * * * It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. * * * Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. * * *

The Senate refused to agree to that portion of the House Bill which permitted collection within a year after the enactment of the new Act of amounts not yet paid, but the prohibition upon refunds of amounts already paid was retained.

Section 611 did not refer, as contended by the petitioners, only to those cases where a refund claim was filed after the enactment of the Act. It contains no language which can be said to accomplish such a result. The phrase "is filed" contained in Section 607 refers to the statute and not to the time of action, and there is no apparent reason for confining the operation of that section to

those taxpayers who filed claims for refund after the passage of the Act. But, irrespective of the interpretation placed on the phrase in Section 607, the provisions of Section 611 clearly refer to past action with respect to what should be considered an overpayment. There is no reference in Section 611 to claims for refund or to the time for filing them. Likewise there is nothing in the language of the section which restricts its application to those cases in which voluntary payments were made and renders it inapplicable to payments made under threat of distraint.

It seems apparent, therefore, that Section 611 of the Revenue Act of 1928 was intended to prevent the recovery of amounts collected where a claim in abatement was filed and collection stayed until after the statute had run. Therefore the only further inquiry is whether the collection here was "stayed" within the meaning of the Act.

II. THE WORD "STAYED" AS USED IN SECTION 611 CONTEMPLATES ADMINISTRATIVE DELAY AS A RESULT OF A CLAIM IN ABATEMENT AND NOT A TECHNICAL LEGAL STAY.

Petitioner contends that the word "stayed" as used in the statute contemplates a mandatory or judicial stay as a result of which the Commissioner was forbidden to collect, and that it has not been shown in the instant case that collection was thus stayed within the meaning of the statute. We submit that so to hold would be contrary to the legislative intent and would deprive Section 611 of any substantial effect.

The legislative history leaves no doubt of the intention of Congress in its use of the word. The Ways and Means Committee Report, *infra*, p. 48, states, in part (p. 34):

> Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and *thus delay the collection* until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. (Italics ours.)

The Report of the Finance Committee of the Senate, *infra*, p. 49, states, in part (p. 42):

> Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if no assessment had been made but the *collection delayed* by the filing of a claim in abatement, * * *. (Italics ours.)

In the Conference Committee Report, *infra*, p. 50), reference is made to "proceedings for the collection of the tax * * * not promptly instituted (as would have been the case had the claim in abatement not been filed) * * *." From these statements it appears that the word "stayed," as used in the statute, does not contemplate a judicial or statutory stay of proceedings, but merely refers to the

Collector's deferring the collection as a result of the claim in abatement.

Moreover, as to taxes assessed prior to June 2, 1924, in respect of which no appeal has been taken to the Board of Tax Appeals, the only provision for a mandatory stay which we have found is contained in Section 284 (a) (14) of the Revenue Act of 1918. This provision has a very limited application, refers only to the taxes for the year 1918, and requires the giving of bonds. If a bond is given, the collection is not restricted by the statute of limitations but only by the provisions of the bond itself. *United States* v. *John Barth Co.*, 279 U. S. 370. Section 611 refers to a claim in abatement with or without bond. There is no mandatory stay without bond. Therefore, it is apparent that to limit its application to a mandatory stay with bond would be to disregard the provisions of the statute and to limit the application of the section to the few cases in which the statute of limitations is not effective since collection could always be made upon the bond irrespective of the statute. As was said by the Circuit Court of Appeals for the Second Circuit in *Reeves, Inc.*, v. *Anderson*, *supra*, not yet reported but to be found in Prentice Hall, Federal Tax Service, Vol. I, 1930, paragraph 1983:

> . . . if we construe "stayed" to mean a legal bar, we should give the section no scope whatever. Patently it must refer to those cases in which the collector did not

proceed with enforcement while the Commissioner was engaged in passing upon the claim for abatement; such a stay has in practice been recognized as ancillary to the Commissioner's power to remit.

The reasons for this conclusion may be found in the following statement by the District Court in *Reeves, Inc.*, v. *Anderson*, reported as *Regla Coal Co.* v. *Bowers*, 37 F. (2d) 373, 375–376):

> The 1918 act, however, required that a claim for abatement be accompanied by a bond; Section 611 of the Act of 1928, by its express terms, is applicable, irrespective of whether or not a bond accompanied the claim. Moreover, while the Act of 1918 was the only statute prior to 1924 which made provision for a claim and formal stay, the Commissioner of Internal Revenue has had authority to abate or refund taxes illegally assessed throughout the period under review. See 26 USCA, Sec. 149, historical note. And pursuant to statutory authority, the Commissioner, with the approval of the Secretary of the Treasury, promulgated regulations which included provisions for the filing of claims in abatement. In none of them, however, was the execution of a bond required, or was there a mandatory provision that collection must be stayed pending decision on the claim in abatement. On the contrary, it was provided that the filing of a claim in abatement did not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due

diligence to prevent the collection of the tax being jeopardized by the running of the statute or otherwise. See article 261, regulation 33; article 1032, regulation 46; article 1032, regulation 62; cf. *United States* v. *Burden, Smith & Co.* (C. C. A.) 33 F. (2d) 229, 230. Under these regulations, the collector had authority to postpone the collection of the tax pending the determination of the claim for abatement, unless, in his judgment, such action would jeopardize the ultimate collection of the tax. Postponement was the common practice where there was no doubt as to the solvency of the taxpayer; in many cases the period of the statutory bar on collection expired before the decision on the claim in abatement had been rendered. See H. R. Rep. No. 2, 70th Cong., 1st Sess., page 34; H. R. Doc. No. 578, 69th Cong., 2d Sess., page 3, et seq. This was because prior to *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676, the Bureau believed that the limitation provisions did not apply to distraints, and that therefore the collection was not in fact jeopardized.

Following the decision in the *Albany Lighterage Case*, a large number of taxpayers in the situation of the present plaintiffs, who had failed to have their assessments abated and who had been forced to pay under threat of distraint, sought to secure refunds on the ground that the taxes had been illegally collected. It was to meet this situation that the present sec-

tion 611 (26 U S C A Sec. 2611) was drafted * * *.

The foregoing argument also disposes of any contention that it must affirmatively appear that the filing of a claim in abatement resulted in a stay. As no statute stayed collection upon the filing of a claim in abatement and such filing did not under the regulations necessarily delay the collection, Congress refrained from placing a condition in this section that upon filing of a claim in abatement collection must have been stayed by statutory or judicial mandate. Congress knew the situation and legislated with reference to that situation. As the Circuit Court of Appeals said in *Reeves, Inc.*, v. *Anderson, supra:*

> * * * to suppose that the collector * * * withheld action for any other reason than because his collection might turn out to be unwarranted, is to assume that he was slack in his duty; we are entitled to assume the opposite. Article 1032 of Regulations 45 puts collection in his discretion in such circumstances; his inaction would have been without excuse except for the claim. Regardless of the evantual burden of proof on the issue, the presumption is that the delay was caused by the claim; * * *.

The collection was delayed in these cases to permit an appeal to the Commissioner and the claim in abatement was the medium through which the appeal was to be effected. It made possible an appeal in cases where appeal was not afforded prior to

assessment. (See Section 250 of the Revenue Act of 1921 and Article 1032, Regulations 62.)

Nor is there any merit in the contention that the pendency of the claim in abatement must have continued to delay the collection until after the statutory period for collection had expired. The section does not so require. It in terms applies to every tax paid prior to May 29, 1929 (one year after the enactment of Section 611), in which a claim in abatement was filed and collection stayed. The taxpayer here chose to avail himself of the privilege of claiming abatement in preference to paying the tax and seeking refundment, and the action of the collector in deferring collection fixed the status of the tax and of proceedings relating to it for the purposes of this section. It thereby became a tax the collection of which was "stayed," and the section applies without limitation to every tax within that class. Cf. *Parker v. Routzahn, Collector*, decided October 28, 1930 (N. D. Ohio), not yet reported, to be found in Prentice-Hall Federal Tax Service, 1930, vol. 2, par. 1966; *Wolf Safety Lamp Co. v. United States*, decided Oct. 14, 1930 (S. D. N. Y.), not yet reported, to be found in Prentice-Hall Federal Tax Service, 1930, vol. 2, par. 1969.

II

SECTION 611 OF THE REVENUE ACT OF 1928 DOES NOT [illegible] PROVIDE A RULE FOR ADMINISTRATIVE GUIDANCE BUT EFFECTIVELY BARS THE RIGHT OF RECOVERY BY SUIT

The contention is made that section 611 merely established a rule for administrative guidance of

the Commissioner and has no effect on the right of the taxpayer to recovery in court. The contention is based upon the view that Section 611 is merely a limitation on Section 607; that the latter section was enacted merely for the Commissioner's guidance and that the words "overpayment," "credit," and "refund" wherever used have always referred to administrative action alone.

It has been argued under Point I of this brief that it was the legislative intent to bar recovery of amounts paid which were properly due, except for statutory limitations, when a claim in abatement was filed and collection delayed. Certainly Section 611 as originally proposed by the House contemplated more than a rule for administrative guidance, since it not only prohibited refunds but also allowed collection after the enactment of the Act. The elimination of the collection portion and the retention of the prohibition against refunds of amounts already collected did not change the underlying purpose sought to prevent repayment of amounts properly owing but collected after the statute had run. The legislation entirely fails in its purpose if the petitioners' construction is adopted and the taxpayer may recover the amounts by suit. Moreover, there would be no purpose in referring to an administrative officer a claim which he could not grant, but which the taxpayer could recover by suit in court. As the Court of Claims said in *Oak Worsted Mills* v. *United States*, supra,

36 F. (2d) 529, 533, now pending in this Court (No. 104, October Term, 1930):

> It will be observed in this connection that the decisions cited by plaintiff assert that these sections are merely directions to the Commissioner, collector, or other officials of the Government, and nothing more, and therefore, notwithstanding their provisions, suit may be brought and maintained to recover the tax. The doctrine laid down by these decisions as to cases which come under the exceptions of section 611 would create a situation that is very peculiar to say the least. If, for example, a demand is made upon a collector for repayment, he must say that he is forbidden by law to make it, but, if suit is begun against him for the same thing for which demand was made, it can be maintained, and judgment can be entered against him. That Congress intended anything so inconsistent and useless we think no one will contend. When the language of the two sections is considered, we think it will be seen there is nothing in them which requires such a construction.

That the words "overpayment" and "refund" may refer to something more than an administrative act of the Commissioner is shown by other provisions of law. The Board of Tax Appeals is authorized to find an overpayment, thereby disposing of the substantive right. Cf. Revenue Act of 1928, Section 507; Revenue Act of 1926, Sections 284 (e), 319 (c). A "suit for refund" is recognized. Revenue Act of 1926, Sections 284 (d) (3)

319 (z) (3). Section 611 states that payments made under the circumstances set forth therein shall not be considered overpayments under the provisions of Section 607. The heading of Section 607 shows a purpose to define the actual "effect of expiration of period of limitation against United States" and not merely to guide the Commissioner in the performance of his administrative duties.

That the language used in reality goes to the substantive right is further shown by reference to the law as it exists with respect to the recovery of taxes paid. The Government may prescribe the conditions on which suit may be brought to recover taxes, and unless such conditions are met recovery will not be allowed. *Cheatham* v. *United States*, 92 U. S. 85; *Savings Institution* v. *Blair*, 116 U. S. 200; *Dodge* v. *Osborn*, 240 U. S. 118. As a prerequisite to a suit for the recovery of taxes wrongfully exacted, a claim for refund must be presented to the Commissioner. Revised Statutes, Section 3226. The right to sue follows his refusal to make the refund to which the taxpayer is entitled, or upon his failure to act. This system of corrective justice, as it was called in *Snyder* v. *Marks*, 109 U. S. 189, 194, could not have contemplated a demand on the Commissioner as an idle thing and without meaning. It must have intended that his power to remit was at least as broad as the right of the taxpayer to recover and that the taxpayer was entitled to refund by the Commissioner in all cases where there was a right of recovery. In

Savings Institution v. *Blair, supra,* the Court said (p. 205):

> In our opinion no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that, unless so presented, the right to demand the repayment of the tax is lost, and the Commissioner has no authority to refund it, and, of course, the right of suit is gone. We regard the presentation of the claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the Commissioner within the time and in the manner pointed out by law and relief has been denied him. *Cheatham* v. *United States,* 92 U. S. 85; *Railroad Co.* v. *United States,* 101 U. S. 543; *Arnson* v. *Murphy,* 115 U. S. 579.

Conversely, we submit that if there are cases in which the Commissioner is not authorized to repay or refund, no right to sue the United States or the Collector exists. Cf. *Girard Trust Co.* v. *United States,* 270 U. S. 163, in which this Court said (p. 174):

> We think that if Congress intended him to recover interest for his accommodation of the Government by a premature payment of

his taxes illegally collected, it would have made a specific provision for it and have given the Commissioner special authority.

Viewed in this light, we submit that the definition of a payment out of time as an overpayment and the direction to refund or credit contained in Section 607 refers to and makes certain the substantive right which had been uncertain under Section 1106 (a) of the Revenue Act of 1926. The situation is even clearer with respect to Section 611. It is not complicated by the presence of the words "credit" or "refund" and refers to Section 607 only because that section concerned the effect of the statute of limitations, also involved in the application of Section 611. Moreover, the reasons underlying the enactment of Section 611 were wholly different from those underlying Section 607, and if it is to be held that the substantive right is not affected by Section 611 then the legislative intent in the enactment is wholly frustrated.

Nor can it reasonably be contended that even if the above is true with respect to suits against the United States, the same reasoning can not apply to suits against a collector. We contend under Point III herein that the common-law right to sue a collector *in assumpsit* was taken away by statutes which prevented him from withholding for his own protection amounts paid by taxpayers and that a statutory right arose by necessary implication from Sections 3220 and 3226 of the Revised Statutes.

By Section 3220 the Commissioner was authorized to remit, refund, and pay back taxes illegally or erroneously assessed or collected and all damages and costs recovered against any collector by reason of anything done in the due performance of his official duty. Section 619 of the Revenue Act of 1928 amended Section 3220 of the Revised Statutes, as amended, by inserting the words "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." This would seem to make Section 611 a clear limitation on the right of the Commissioner to refund taxes and to bar suit against the collector as well as against the United States. The later change in Section 3220 by the Act of May 29, 1928, c. 901, 45 Stat. 986, 996 (U. S. C. Sup. III, Title 26, Section 149), does not modify the effect of Section 619 so far as construing the purpose of Section 611 is concerned. The general effect of this later amendment of Section 3220 is discussed in the Government's brief in *Magee* v. *United States*, No. 65, present term.

Moreover, we submit that, regardless of the credit or refund clause of Section 607, the word "overpayment" in Section 611 is broad enough to strike the foundation from under any recovery by action, by credit, or by refund. It dealt with the merits of the recovery as well as the remedies available. It is interesting to note that the Circuit

Court of Appeals for the Second Circuit, which was of the opinion that the credit or refund clause of Section 1106 (a) of the Revenue Act of 1926 did not prevent an action in court (*Ellay Co.* v. *Bowers, supra*), held that under Section 611 the word "overpayment" as used covered the substantive right. *Reeves, Inc.,* v. *Anderson, supra.*

III

SECTION 611 IS NOT UNCONSTITUTIONAL IF CONSTRUED TO PREVENT RECOVERY HEREIN

Petitioners argue that in any event Section 611, if given the effect contended for by the respondent, is unconstitutional as an attempt to take property without due process of law. This argument is based on the fact that the liability of the taxpayer for the additional taxes of 1917 had been extinguished before suit was brought and that Section 611, if construed to prevent recovery, deprived the petitioners of a vested right not to pay the taxes which had been extinguished.

At the time the taxes herein were collected, the statute of limitations against collection had run. This fact did not operate to extinguish the liability but merely affected the remedy. Cf. *Campbell* v. *Holt*, 115 U. S. 620, 624-628; *Campbell* v. *Haverhill*, 155 U. S. 610, 618. Nor did Section 1106 (a) of the Revenue Act of 1926, *infra*, p. 40, extinguish the petitioners' liability. Payment was made in November and December, 1924, before the enactment of that Act and the liability for the amount was ex-

tinguished by such payment. Clearly Section 1106 (a) was not retroactive in its scope and could not affect taxes paid before its enactment.

But even if the liability had been extinguished, Section 611 is not unconstitutional. In *United States* v. *Wyman, Partridge & Co.* which is now before the Court on certiorari (No. 416) and which is to be argued as one of the group of cases involving the effect of Section 611, it is contended for the Government that the section is not unconstitutional if construed to prevent recovery of taxes collected out of time and after the Revenue Act of 1926 was enacted. We do not consider that the question is involved under the facts of this case, but reference is made to the Government's argument in the *Wyman, Partridge & Co. case* if the Court believes that the point is material here.

If the liability for the tax here was not extinguished otherwise than by payment at the time suit for refund was brought, it is submitted that Section 611 is clearly constitutional if construed to prevent recovery. It is nothing more than a limitation on the granted privilege to sue for refund of taxes paid into the Treasury. If the amounts were greater than those legally due, it does not prevent their recovery. It merely operates in cases coming within its classification to deprive the taxpayer of the right to recover amounts legally due but paid out of time. At the time of collection the liability existed but the right of collection was barred. The

statute of limitations may be extended in order to restore the right of a creditor to sue a debtor even though the bar of the statute had become complete before such suit was instituted. Cf. *Campbell* v. *Holt*, *supra*. That anyone can sue the sovereign at all is by the grace of Congress. That Congress can place any restriction on that right is a necessary corollary. Purely formal conditions can be imposed upon the exercise of that right. *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141, 143. The right can be completely withdrawn before suit (*The Collector* v. *Hubbard*, 12 Wall. 1), or after suit (*United States* v. *Heinszen & Co.*, 206 U. S. 370), and even after judgment Congress can deprive the judgment of any effect (*Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226). It must, therefore, be apparent that, since the Government may prescribe the circumstances under which it consents to be sued, it may also change, modify, or extend a statute of limitation against itself. No vested right is thereby impaired since no such right accrues to the taxpayer out of the running of the period of limitation for the collection of a valid tax. *Campbell* v. *Holt*, *supra*; *The Collector* v. *Hubbard*, 12 Wall. 1. As this Court said in the case last cited (p. 14):

> Remedies of this kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer cannot have any

vested right in the remedy granted by Congress for the correction of an error in taxation.

The legislative enactment considered in *United States* v. *Heinszen & Co.*, 206 U. S. 370, *supra*, went much farther than does the Act here involved. There suit was brought in the Court of Claims on July 1, 1902, to recover duties exacted in the Philippine Islands by the military authorities on goods imported between April 11, 1899, and November 15, 1901. The exactions were illegal, having been made under order of the President but before the time Congress, by the Act of March 8, 1902, enacted tariff duties for the Philippine Islands. While the case was pending in the Court of Claims, Congress by the Act of June 30, 1906, ratified the exactions. The Court of Claims refused to give effect to the ratifying Act and gave judgment for the plaintiff. It was argued in this Court that Congress could not by retroactive laws impair vested rights without violating the principle that no man shall be deprived of his property without due process of law, and that to give effect to the ratifying Act of 1906 in a case where suit was brought prior thereto would violate the Fifth Amendment. This Court disposed of the argument in the following language (p. 386):

> But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already ob-

served, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2, pp. 415, 416):

"The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. * * *"

Nor does the mere fact that at the time the ratifying statute was enacted this action was pending for the recovery of the sums paid cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest.

Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed., p. 543):

"Nor is it important, in any of the cases to which we have referred, that the legisla-

tive act, which cures the irregularity, defect or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suits vests in a party no right to a particular decision; * * *."

Nor does the fact that the instant case involves a suit against a collector of internal revenue rather than against the United States lead to a different conclusion. Actions against a collector are personal in the sense that they may not be prosecuted against his successor in office and judgments therein are not *res judicata* in suits against the United States. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Sage* v. *United States*, 250 U. S. 33. But such suits are now statutory and are no longer founded on a common law liability. The common law suit *in assumpsit* against a collector was based on the theory that he was an agent of the Government who was permitted to withhold for his own protection sums collected when he had been notified that the taxpayer claimed the right to recover such sums on the ground that they were illegally exacted. *Cary* v. *Curtis*, 3 How. 235; *Arnson* v. *Murphy*, 109 U. S. 238. When the right to withhold was taken away by statutes requiring him to pay sums collected into the Treasury without regard for claims erroneously and illegally exacted, all right to proceed against the collector was lost. *Cary* v. *Curtis*, *supra*; *Curtis's Administratrix* v. *Fiedler*, 2 Black 461, 478. By later enactment

Congress restored the right to sue a collector although the prohibition against withholding sums for his protection was retained. The new right of action was exclusively statutory and could be maintained only because it was authorized by the statute. Cf. *Arnson* v. *Murphy*, 115 U. S. 579; *Schoenfeld* v. *Hendricks*, 152 U. S. 691, 693.

The above cases were concerned with the right to sue collectors of customs. The same principle applies to collectors of internal revenue. Their right to withhold for their protection sums collected has been taken away (Revised Statutes, Section 3210; Act of March 3, 1865, 13 Stat. 469, 483) and the present right of action against them results from statutory provisions. Cf. *City of Philadelphia* v. *The Collector*, 5 Wall. 720, 732–733; *The Collector* v. *Hubbard, supra; DeBary* v. *Dunne*, 162 Fed. 961 (C. C. Ore.). It seems clear that the present right to sue a collector of internal revenue is a statutory right arising by necessary implication from Sections 3220 and 3226 of the Revised Statutes and that the remedy may be changed or modified at the will of Congress. This Court has affirmed modifications of the right in the following cases:

In *Collector* v. *Hubbard, supra*, it was held that suit would not lie until after appeal to the Commissioner. In *Savings Institution* v. *Blair, supra*, it was held that the claim must be filed within the time specified by the statutes, and, as has been

pointed out heretofore in *Cary* v. *Curtis*, it appeared that it was within the power of Congress absolutely to prohibit a suit to recover duties paid to a collector. The case of *Rafferty* v. *Smith, Bell & Co., supra*, extended the rule previously laid down in *United States* v. *Heinszen & Co., supra*, to suits against collectors of internal revenue and those in which judgment had been secured in a lower court prior to the withdrawal by the United States of its consent to be sued. We submit, therefore, that the remedy against a collector of internal revenue does not differ in any manner with regard to modification from that against the United States which, as previously shown, Congress clearly has the power to modify as has been done by Section 611.

The classification made by Section 611 is reasonable and not arbitrary and capricious and does not offend against the Fifth Amendment. Cf. *Barclay & Co.* v. *Edwards*, 267 U. S. 442. Every statute of limitations involves some discrimination. Taxpayers who secured a delay in the payment of their just shares of the burden of the Government by means of a claim for abatement contributed to the conditions which but for Section 611 would have cost the Government millions of dollars. To limit the application of the section to those cases in which the voluntary act of the taxpayer caused delay is not unreasonable. Nor is it unreasonable to provide that no collections should be made out of time in such cases in the future. The line had to be drawn at some point, and it is submitted that it was proper

to draw that line at payments made prior to May 29, 1929, a year after the effective date of the Revenue Act of 1928.

CONCLUSION

We submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
CHARLES B. RUGG,
Assistant Attorneys General.

CLAUDE R. BRANCH,
SEWALL KEY,
NORMAN D. KELLER,
GEORGE H. FOSTER,
Special Assistants to the Attorney General.

NOVEMBER, 1930.

APPENDIX A

STATUTES

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

* * * * *

SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C., Title 26, Sec. 1061.)

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 113, 115, 116:

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App., Title 26, Sec. 1249.)

* * * * *

SEC. 1111. Section 3220 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3220. Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926 the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official

duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section." (U. S. C. App., Title 26, Sec. 149.)

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. App., Title 26, Sec. 157.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim

for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. App., Title 26, Sec. 156.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, 878.

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C. Sup. III, Title 26, Sec. 2607.)

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C. Sup. III, Title 26, Sec. 2611.)

SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. (U. S. C., Sup. III, Title 26, Sec. 2612.)

SEC. 619. MINOR ADMINISTRATIVE AMENDMENTS.

* * * * * *

(b) Section 3220 of the Revised Statutes, as amended by section 1111 of the Revenue Act of 1926, is amended by striking out "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926" and inserting in lieu thereof "Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes."

(c) Section 3228 of the Revised Statutes, as amended by section 1112 of the Revenue Act of 1926, is amended by striking out "except as provided in sections 284 and 319 of the Revenue Act of 1926" and inserting "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate,

and gift taxes." (U. S. C., Sup. III, Title 26, Sec. 2619.)

Act of May 29, 1928, c. 901, 45 Stat. 986, 996 (U. S. C., Sup. III, Title 26, Sec. 149):

SEC. 3. Section 3220, Revised Statutes (title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:

"REFUNDMENTS; TAXES AND PENALTIES.—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section."

NOTE.—It seems unlikely that Section 3 of Chapter 901 of the Act of May 29, 1928, was intended to abrogate the exception contained in Section 619 (b) of the Revenue Act of 1928. See note to U. S. C. Sup. III, Title 26, Sec. 149.

APPENDIX B

COMMITTEE REPORTS CONCERNING SECTIONS 607 AND 611 OF THE REVENUE ACT OF 1928

1. *Section 607:*

House Report No. 2, 70th Congress, 1st Session, Ways and Means Committee Report (p. 33):

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court

proceedings (no distraint or court proceeding having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new Bill.

Senate Report No. 960, 70th Congress, 1st Session, Finance Committee Report (p. 41):

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of

limitation against the United States and section 608 relates to the effect of the expiration of a period of limitation against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made pursuant to an assessment after the expiration of the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). It is immaterial whether the payment was voluntary or involuntary, and duress is also of no significance in determining the right to recover an amount paid after the statute has run. An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

The section has been rewritten by a committee amendment in somewhat simpler language.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under sec-

tion 1106 (b) of the 1926 act or section 606 of the new bill.

2. *Section 611:*

House Report No. 2, 70th Congress, 1st Session, Ways and Means Committee Report (p. 34):

SEC. 611. COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED.

Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment.

Senate Report No. 960, 70th Congress, 1st Session, Finance Committee Report (p. 42):

COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED

Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the collection delayed by the filing of a claim in abatement, and also prohibits the refund of amounts paid after the running of the statute of limitations in such cases. Your committee believes that the bar of the statute should be made effective as to both the Government and the taxpayer and recommends that this section be eliminated.

Report No. 1882, 70th Congress, 1st Session, Conference Report (pp. 6–7, 22):

Amendment numbered 190:

That the House recede from its disagreement to the amendment of the Senate numbered 190, and agree to the same with an amendment, as follows:

In lieu of the matter proposed to be stricken out by the Senate amendment insert the following:

SEC. 611. *Collections stayed by claim in abatement.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.*

And the Senate agree to the same.

* * * * * *

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

Amendment No. 190: The House bill (sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without a bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded, solely because of the fact that it was paid after the running of the statute, and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in court begun within one year after the enact-

ment of the new law. The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection.

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IN THE

Supreme Court of the United States

October Term, 1930.

No. 36.

R. E. GRAHAM AND E. E. FOSTER, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A CO-PARTNERSHIP, PETITIONERS,

v.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA, RESPONDENT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ, AND BRIEF.

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Amici Curiae.
922 Southern Building, Washington, D. C.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ, AND BRIEF.

MAY IT PLEASE THE COURT:

The undersigned respectfully move this Honorable Court for leave to file the accompanying brief in this case as amici curiae.

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Amici Curiae.

IN THE

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BRIEF OF AMICI CURIÆ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement:

The case was tried before the District Court, for the Southern District of California, which decided in

favor of the petitioner (R. 15-19), upon a motion for judgment upon the stipulated facts. The Circuit Court of Appeals, in an opinion rendered November 4, 1929 (R. 36), and reported in 35 Fed. (2d) 586, reversed the decision of the District Court, on the ground that Section 611 of the Revenue Act of 1928, which had not been relied upon below, barred recovery by the petitioner. Certiorari was granted by this Court on March 3, 1930.

The facts are as follows: In 1920 the Commissioner of Internal Revenue assessed additional income taxes for the year 1917, and the taxpayer filed in the same year a claim to abate (that is, to cancel) this assessment. This claim was pending until December 22, 1922, when the Commissioner denied it. During the interval after this disposition of the claim in 1922 and before March 22, 1923, (on which date the statute of limitation ran against collection by the Government), the Commissioner failed to collect. In 1924, the Government, disregarding the statute of limitations, forced the taxpayer to pay the assessment. The petitioner has sued herein to recover back the sum so paid under duress. The respondent contends that (in spite of the fact that the tax was collected after it was barred) Section 611, Revenue Act of 1928, prevents the taxpayer from recovering in this action. The petitioner contends that Section 611 has no such effect.

Cases involving the construction of Section 611 have been said to fall into two classes, (1) those similar to this case, in which the illegal collection of the tax occurred *before* Section 1106 (a) of the Revenue Act of 1926 became effective (to the effect that the running

of the statute of limitations "extinguishes the liability", as well as bars the remedy), and (2) those in which the collection occurred *after* such effective date.

The Court of Claims suggested such a classification in a very recent decision (*Wyman, Partridge Company v. The United States,* discussed on page 39 of this brief) and considered that the two classes of cases ought to be treated differently. The undersigned *amici curiae* represent taxpayers whose cases would fall in each of the two classes, and urge that recovery should be allowed in both classes.

PROVISIONS OF LAW.

Section 611 of the Revenue Act of 1928 provides:

> "SEC. 611.—COLLECTIONS STAYED BY CLAIM IN ABATEMENT.
>
> "If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 607 provides:

"SEC. 607.—EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

ARGUMENT.

I. In drafting Section 611 of the 1928 Act, Congress used the word "stayed" advisedly and in a sense different from "delayed"; further, even though the word "stayed" is construed as merely meaning "delayed", the facts here involved fail to show that the Collector's failure to collect, after the claim in abatement had been denied, was because of the abatement claim.

(a) The application by the court below of Section 611, 1928 Act, to the instant case was erroneous, first, because there was no "stay" either before or after the rejection of the abatement claim, but rather a mere voluntary delay on the part of the Commissioner in making collection.

In prescribing the condition "if the collection . . . was stayed" Congress was not employing inaccurate terms. By this expression was contemplated some act of the taxpayer which legally or morally tied the hands of the collector. *United States v. Burden,*

Smith & Company, 33 Fed. (2d) 229. No such stay occurred in this case; the Collector merely failed to collect. The petitioner had filed a claim in abatement (Bureau of Internal Revenue Form 47; "claimant now asks and demands an abatement" of the tax) which merely amounted to a request that the previously-made assessment be cancelled. The claim in abatement does not ask the Commissioner to hold up collection. If the Collector does delay, it is either because he is dilatory or because he chooses to delay, and the word "delay", rather than the word "stay" is apt in the situation.

The Treasury Regulations are clear on the subject:

> "* * * The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund" (Article 1032, Regulations 45).

The word "stay" is used in other situations which arise under the Revenue Acts, where the Collector is under some obligation to defer collection. For instance, Section 273, Revenue Act of 1928, at paragraphs (f), (g) and (h), provides for a "bond to *stay* collection". If an acceptable bond is filed, the collection is stayed in the sense that it is illegal for the Collector to enforce collection, and there are other circumstances, not involving the giving of a bond,

in which the Collector is legally or morally prevented from making collection. Thus, if the taxpayer appeals to the Board of Tax Appeals from a 60-day letter, the Collector is powerless to make collection unless the situation is such that an emergency exists. The filing of an appeal "stays" the hand of the Collector. In other cases, collection has been stayed by the deposit of money in escrow instead of giving a bond, as in *Pigott v. Poe,* Prentice-Hall 1929 Federal Tax Service, Par. 1749, page 1615. Other forms of binding agreements relating to abatement claims are met with, which, as effectively as a bond, would directly stay collection by tying the hands of the Collector. Compare *Mascot Oil Company, Inc., v. The United States,* 37 Fed. (2d) 986. The most that Section 611 purports to do is to reach such cases, as well as those where the stay is due to the filing of a bond;—not such cases as the present, involving mere delay, without obligation of any sort.

In Section 603 (c) of the same Act, it is provided that an appeal to the courts to review a decision of the Board of Tax Appeals "shall not *operate* as a stay of assessment and collection", and Subdivision (d) of the same Section prescribed the procedure to be followed "where assessment or collection has not been *stayed* by the filing of bond." Thus, Congress had in mind some act which "operated" on the Collector and stayed his hand.

The rule of construction applied by this Court to the meaning of the word "proceeding" in Section 250 (d) of the Revenue Act of 1918, in the case of *Bowers v.*

New York & Albany Lighterage Company, 273 U. S. 346, is fully applicable here, but the court below, in construing Section 611, gave that section a more than liberal construction in favor of the collector, and against the taxpayer.

(b) The decision of the court below was erroneous, also, because, even if the Collector's inaction *after the claim was rejected* is regarded as a "stay", there is no evidence that such stay was caused "*by* the claim in abatement", since that claim had previously been disposed of by rejection.

The heading of Section 611, "Collection Stayed *by* Claim in Abatement", confirms the common sense conclusion that the section was meant to apply only when the claim in abatement was the active cause of the failure to collect in time. Even if there has been a "stay", operating up to March 22, 1923, this would not be material, if it was due to some other cause; the stay must be caused "by claim in abatement" if it is to affect the case.

It clearly appeared that, after the rejection of the claim in abatement, there remained a period of two months and twenty-five days (from December 22, 1922, to March 22, 1923) within which summary collection could have been made by the collector. He did not collect during that period. In fact, no collection was made until November 19, 1924, approximately one year, ten and a half months after the claim in abatement was denied.

It was the collector's duty to make collection at once after rejecting the claim, if he had not elected to col-

lect before. His failure to collect during the period of nearly three months which remained before the running of the statute of limitations was not shown to be due to any provision of law or anything the taxpayer did. The length of his actual delay (more than one and three-fourths years after the claim in abatement had become *functus officio* through rejection) tends to negative any idea that his failure to collect was due to anything but oversight.

In this case it is impossible to find that there was any relation between the claim in abatement which was denied in 1922 and the delay in collection which *thereafter* occurred unless, without warrant, we assume an irrebuttable presumption to that effect. Article 1032 of Regulations 45, previously quoted, negatives any such presumption, since it expressly instructs a collector that he is free to collect, if he considers it necessary, even though an abatement claim has been filed.

These regulations reflect what is otherwise well known, i. e., that collectors of internal revenue operate under bond (Section 3143, Revised Statutes; Section 15, Title 26 U. S. Code), are charged with the taxes assessed against taxpayers in their collection district, and have very broad discretion as to the time and manner of making collections, and in addition *sometimes fail to make collections within the period required by law, through mere oversight.*

It should be noted that the facts in this case are peculiarly within the knowledge of the Collector, whose delay in collection rendered his subsequent collection illegal. Must the taxpayer put the Collector on the

witness stand and seek to prove by him the negative proposition that the delay was not due to the abatement claim?

Clearly the Collector had the burden of proving that the delay which occurred was due to the petitioner's abatement claim. Yet no evidence to that effect was offered, nor is such finding warranted from the undisputed facts in the case. On the contrary the facts show that after the abatement claim ceased to exist, because of rejection by the Commissioner, time still existed within which collection legally could have been made, but that collection was not attempted until almost two years thereafter, requiring the conclusion that the delay which occurred was due to mere oversight or neglect of the collector, and that the abatement claim had nothing to do with such delay.

II.

Section 611 is but a subsidiary of Section 607 of the Revenue Act of 1928, and both relate solely to administrative refunds and credits and have nothing to do with recoveries in the courts.

Standing alone Section 611 of the Revenue Act of 1928 has no effect whatever. It merely provides that under certain exceptional conditions a payment of taxes, after the statutory limitation period for collection has expired, "Shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

It will be noted that Section 607 provides that payment made after the statutory period prescribed for collection of income taxes "shall be *considered* an overpayment" and shall be credited or refunded upon claims therefor being duly presented.

Section 607, as will hereinafter be fully shown, was enacted to authorize certain administrative refunds or credits which had previously been forbidden by Section 1106 (a) of the Revenue Act of 1926. Neither Section 607, nor its predecessor, Section 1106 (a) of the Revenue Act of 1926, had any relation to suits in courts, and, as will also be fully shown, Section 611 was not intended to have any relation thereto. They all relate only to the power of the Commissioner to make "refunds and credits" in the course of his administrative duty.

The following history of the various provisions shows (1) that when Congress legislated on the subject of "refunds and credits" it did not mean recoveries by suit, and (2) that the provisions now in question belonged in the class relating only to refunds and credits.

Section 607 provides for "credits" and "refunds." The making of credits and refunds is an administrative function of the Commissioner of Internal Revenue, and has been authorized by each succeeding revenue act since the Revenue Act of 1916 in cases of *overpayments of taxes:* Section 14 (a) Revenue Act of 1916, 39 Stat. 773. Section 252, Revenue Act of 1918, 40 Stat. 1057. Section 252, Revenue Act of 1921, 42 Stat. 227. Section 281, Revenue Act of 1924, 43 Stat. 339.

Section 284, Revenue Act of 1926, 44 Stat. 9. Section 322, Revenue Act of 1928, 45 Stat. 791.

These Sections have been held to have nothing to do with recoveries in the courts, but to relate solely to administrative credits or refunds by the Commissioner of Internal Revenue. *Fox. v. Edwards,* 287 Fed. 669. *Coffey v. Exchange Bank,* 296 Fed. 807.

Beginning with the Revenue Act of 1918 (Section 250(d), Act of February 24, 1919, c. 18, 40 Stat. 1057), Congress placed time limitations upon the assessment and collection of income taxes. Collections made after these periods were wrongful and illegal, but did not result in "overpayments" in the sense that the sums collected had never been due as taxes, and hence amounts so illegally collected were not refundable under the Sections above cited relating to overpayments. However, Section 3220 of the Revised Statutes allowed the Commissioner to make refunds of all taxes "erroneously or illegally assessed or collected * * * and all taxes * * * in any manner wrongfully collected." The Commissioner made refunds in these limitations cases pursuant to this authority.

Taxes illegally collected after the statutory period therefor, but not "overpaid" in the sense of never having been due were recoverable *in actions at law* against collectors. *Graham v. Dupont,* 262 U. S. 234.

In such cases Section 3220 of the Revised Statutes provided for *repayments* of judgments against collectors, and Section 989, Revised Statutes, provides that in cases where the courts issue certificates of probable cause, no executions shall issue against the collectors

but that such judgments shall be paid out of the Treasury of the United States. *Sage v. United States*, 250 U. S. 33. *Smietanka v. Indiana Steel Co.*, 257 U. S. 1.

Section 607 of the Revenue Act of 1928 was enacted to clarify Section 1106(a) of the Revenue Act of 1926, a Section enacted because of the erroneous decision of the Court of Claims in the Toxaway Mills case and judicially construed as having no relation to recoveries by suits in the courts.

In December, 1925, the United States Court of Claims decided the case of *Toxaway Mills v. United States*, 61 Ct. Cls. 363, in which the rule was laid down that a citizen *suing* to recover sums alleged to have been illegally collected after the statutory period therefor, contained in the Revenue Acts of 1918 and 1921, was required to show that he had never in fact owed the tax. It was further held that limitations contained in these revenue acts, merely operated to bar the remedy and did not extinguish the liability, so that the alleged requirement that the citizen show that he had overpaid the tax, even when collection was illegally had, was a valid requirement imposed upon citizens suing in the courts of the United States.

This decision resulted in the incorporation in the Revenue Act of 1926, 44 Stat. 9, of Section 1106, subdivision (a) of which provided:

> "SEC. 1106(a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such

> tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

The purpose of this enactment was declared in Conference Report on the Revenue Bill of 1926 (*House Report No.* 356, *p.* 55, 69*th Congress, First Session*) as follows:

> "AMENDMENT No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (Toxaway Mills v. U. S.), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft C. J. in Graham v. DuPont, 262 U. S. 234, 256, 258.")

The taxing authorities also contended in suits for repayments of moneys illegally collected by distraint after the period prescribed for collection in the Revenue Acts of 1918 and 1921, that the limitations contained therein related only to collections had by suits against citizens and not to *distraint* collections, which, it was contended, were not "proceedings" within the meaning of the limitations provision of those Acts.

This Court in the case of *Bowers v. New York and Albany Lighterage Company,* 273 U. S. 346, decided February 21, 1927, held this construction of these statutes to be erroneous and sustained the right of citizens to *sue for* taxes illegally collected after the period prescribed therefor, without requiring proof that they had "overpaid" the tax.

The writ of certiorari had been granted in the case of the *Toxaway Mills v. United States, supra,* but in the light of the decision in the *New York & Albany Lighterage Company* case, the Solicitor General confessed error, and the decision of the Court of Claims was reversed (273 U. S. 781).

Taxpayers were much perturbed by Section 1106 (a) of the Revenue Act of 1926 which, while (1) negativing the proposition of the Court of Claims in the *Toxaway Mills* case that the running of the period of limitations on collection barred the remedy but did not extinguish the liability, at the same time (2) provided that no refund or credit should be made of sums so illegally collected unless it also appeared that the tax had been *overpaid.* In Congressional intention the first of these provisions opened the way for suit against the Government; the second denied to the Commissioner the right to make refunds on his own responsibility in such cases, and made him await the judgment of a court.

But this second provision was construed by some citizens (as has been Section 611 in the instant case by the court below) as precluding even *suit* for recovery of taxes illegally collected, after the statutory period therefor, unless the tax had been overpaid, and

suits were brought to enjoin collections of barred taxes in such cases. This was on the theory that since all adequate remedies at law had been taken away, the prohibition against the enjoining of collection of Federal taxes, contained in Section 3224, Revised Statutes, did not apply. These suits, defended by Government counsel, brought out the error of these taxpayers in assuming that Section 1106(a) related to repayments of judgments secured in the courts and it was held therein that *section 1106(a) prohibited credits and refunds by the Commissioner of Internal Revenue and had nothing to do with suits in the courts. Ellay Company v. Bowers,* 25 Fed.(2d) 637, certiorari denied 48 S. Ct. 601; *Thornhill Wagon Co. v. Noel,* 17 Fed. (2d) 407; *Gove v. Nichols,* 23 Fed. (2d) 856.

The Court of Claims, in the case of *Adelaide F. Chapman v. United States,* 63 Ct. Cls. 424, construed Section 1106(a), of the Revenue Act of 1926, as preventing recoveries of barred taxes by suit unless the tax had been in fact overpaid. However, the Solicitor General joined the taxpayer in opposing this construction of Section 1106(a), stating in his brief for the United States on application to this Court by the taxpayer for writ of certiorari in the *Chapman* case that:

> "Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in Graham v. Dupont, supra, or prevent distraint proceedings by injunction and may be compelled by the col-

> lector to pay a tax the collection of which is barred by the statute of limitations, and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

At this stage was enacted the Revenue Act of 1928 which differed from preceding revenue laws in that it merely supplemented the Revenue Act of 1926, leaving operative all provisions of the earlier law, not specifically repealed or modified. By Section 612 of the Act of 1928 it was provided that Section 1106(a) of the Act of 1926 was repealed "as of February 26, 1926," the date of its enactment, and in lieu thereof Sections 607 to 611, inclusive, were enacted. This substitution was obviously in order to clear up the confusion existing as to the meaning of Section 1106(a) of the prior Act.

Thereafter this Court, upon the motion of the Solicitor General, reversed the Court of Claims in the case of *Chapman v. United States, supra*, remanding the case with instructions to enter judgment for the taxpayer (279 U. S. 660).

It is clear from what theretofore had transpired that Section 607, in declaring that payments of taxes after the statutory period therefor "shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim" was merely authorizing what Section 1106(a) forbade, i. e., administrative

credits or refunds by the Commissioner where barred collections had been made, even though there was no true "overpayment" involved. *This was the sole purpose of Section 607, which, like the Sections which preceded it relating to credits or refunds, had nothing to do with rights of action for repayments in the courts.*

Section 611, which merely declares what "shall *not* be considered an overpayment under Section 607" was intended only to preserve (in the cases where collections had been stayed by abatement claims) the prohibition against administrative refunds, where the taxpayer had not overpaid the tax, which was formerly contained in Section 1106(a) of the 1926 Act but was removed by Section 607, and, like Section 1106(a), was not intended to have any effect upon rights of taxpayers to sue and recover in the courts.

This is emphasized by Section 619 of the Act of 1928 which amends Section 3220 of the Revised Statutes, so as to authorize the Commissioner to *refund* illegally collected taxes "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate and gift taxes."

The legislative history of Section 611 also renders necessary its construction as having nothing to do with recoveries in the courts of illegally collected taxes.

Section 611 was enacted at the solicitation of the Treasury Department to permit of clarification by the Courts, through further decisions, of the effect of the decision of this Court in the case of *Bowers v. New York & Albany Lighterage Company, supra.*

House Bill Number One, which became the Revenue Act of 1928, as originally drawn proposed not only to prohibit refunds, but to allow further collections to be made within one year after the passage of the Act, in cases where collections had been stayed by abatement claims. The explanation of this section by the House Committee on Ways and Means (House Report No. 2, 70th Congress, First Session, page 34) appears in the appendix hereto.

The Senate opposed all change on this point, as is shown by Senate Report to the Finance Committee (Senate Report No. 960, page 42, 70th Congress, First Session).

In conference a compromise was reached in which the portion of Section 611 relating to *refunds* was allowed to stand and the portion of Section 611 authorizing further collections was stricken out of the bill as finally enacted.

The Managers for the House in this connection stated:

> "The House Bill (Sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed with or without bond and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded solely because of the fact that it was paid after the running of the statute

and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in Court begun within one year after the enactment of the new law. *The Senate amendment struck out this section and the House recedes with an amendment retaining the prohibition on refunds, as above described, and eliminating the authority for collection.*" (Statement of Managers for the House, page 22.)

By eliminating the *authority for collection* Congress refused to "withdraw" from the taxpayer "the defense of the Statute of Limitations" which the Committee on Ways and Means (see Appendix) originally planned to do. The House *receded* on this point but insisted on the prohibition of *refunds.*

The reports of these Committees say nothing about suits in the Courts, but do refer to *refunds,* which, it must be presumed, were known to the Committees to be administrative acts of the Commissioner, and something different from repayments of judgments duly secured in the Courts. Had it been intended to affect recoveries in the Courts, language appropriate to express that intent unquestionably would have been employed and appropriate modifications would have been made of Sections 989 and 3220 of the Revised Statutes, which regulate suits and recoveries in the Courts. *Sage v. United States, supra. Smietanka v. Indiana Steel Company, supra.*

Everything that was provided in Section 611 as originally drawn, and as finally enacted, and everything that was said by the House and Senate Committees was entirely consistent with a purpose merely

to prohibit administrative refunds in the situations described.

Section 611 is a mere limitation upon Section 607, and no one will seriously contend that Section 607 purported to establish any rule as to suits in the courts, in cases of payments or collections of taxes after the statutory period for collection had expired. In making Section 611 a mere limitation upon or exception to Section 607, Congress was going fully as far as it intended to go, and, indeed, as far as the administrative officers had asked it to go in providing relief against the effect of the decision of this Court in the *New York & Albany Lighterage Company* case.

Congress showed no purpose to prescribe what the courts should decide was the effect upon taxpayers' rights to recover illegally collected taxes in cases where collections were stayed by abatement claims filed by the taxpayers. That issue was left to be raised by way of defense by the United States, or by collectors, in suits brought by taxpayers to recover sums claimed to have been illegally collected after the statutory period therefor. It is usual for Congress to direct what administrative officers may do, but unusual for Congress to prescribe what *facts* shall be held by the courts to constitute an estoppel, and an intent so to do is nowhere expressed in Section 611, which by its terms and relation to other sections of the law relates only to administrative credits and refunds.

All the decisions, so far rendered, which have held that Section 611 was a bar to recoveries in the courts appear to have done so because it was not realized that the Congress, in the revenue laws, has consistently

maintained distinctions between credits and refunds of *overpayments* made in the exercise of administrative discretion, and recoveries in the courts of taxes *illegally collected*, and has, as in Section 1106(a) of the Act of 1926, forbidden such credits and refunds even though, when suits were prosecuted, recoveries might be had. Illustrative of this fallacy are decisions in the cases of *Wright & Taylor* v. *Lucas*, 34 Fed.(2d) 328, and *Regla Coal Co.* v. *Bowers* 37 Fed.(2d) 373.

In *Reeves v. Anderson*, decided July 21, 1930, (opinion reprinted in Prentice Hall Federal Tax Service, 1930, at page 1705), the Circuit Court of Appeals for the Second Circuit concluded that Section 607 was inserted for the purpose of giving a definition of overpayment, in addition to the purpose of allowing administrative credits and refunds which had been forbidden by Section 1106(a) of the Revenue Act of 1926. The court then considered Section 611 as limiting that definition, and as only incidentally forbidding credits and refunds under that section. This construction, as the legislative history of Section 607 shows, forces that section to serve a broader purpose than was intended—a purpose, as the court concedes, which was unnecessary because of other provisions which were already in the law. Also, Section 607 is plainly an enactment in favor of taxpayers, and the terms employed ("shall be *considered* an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period for filing such claim") seem to show a purpose merely to define the exact extent to which

payments, made under the circumstances described in that section, shall be treated administratively as are true overpayments of taxes. These terms show no purpose to limit in any way the rights of taxpayers to recover such payments under other provisions of the law as taxes illegally collected.

In that case the Commissioner made collection about six weeks after he had rejected the claim in abatement; in the present case, the record shows that he waited approximately one year, ten and a half months. Apparently the Second Circuit might have taken a different view of the present case, where the delay in collection was obviously not due to the pendency of the claim in abatement, since Judge Hand's opinion says:

> "Only in case the taxpayer had positively caused the Treasury's inaction by demanding a hearing, was his advantage taken from him."

In the present case, the taxpayer is not responsible for the delay of one year, ten and a half months after the taxpayer's claim had been disposed of.

III.

Sections 607 and 611 do not purport to apply to cases arising prior to the enactment of the Revenue Act of 1928, and may not be given retroactive effect.

The provisions of Section 607 are, by its terms, entirely prospective. Said Section provides that taxes which have been illegally collected after the period of limitations:

> "*Shall* be considered an overpayment and *shall* be credited or refunded to the taxpayer, if claim therefor *is* filed within the period of limitations for filing such claim."

The terms employed are in the present and future tenses. How, therefore, can they be said to permit application of that Section to cases, such as the present, where taxes have been illegally collected and a claim for refund *was* filed and *was* denied long before the Revenue Act of 1928 was enacted, and especially where the sole issue is whether the Collector of Internal Revenue—who has never had the authority to make refunds—illegally collected the tax? Moreover, said section does not bear after its heading the word "Retroactive"—a practice followed in the statute where retroactive effect was intended. Compare Sections 702 to 706 of said Act.

If the statute be given effect as to all claims for refund or credit presented after the passage of the Revenue Act of 1928, it will have effect and meaning. To give the section a broader scope is to alter and extend the plain and ordinary meaning of the terms employed where a reasonable result is produced by giving them their plain and ordinary meaning. In addition, such construction will operate retroactively without any basis therefor appearing in the statute. Such construction is to be avoided. In *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, 162, the rule is thus stated:

> "Statutes are not to be given retroactive effect or construed to change the status of claims

fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

If retroactive, Section 611 *was intended, at most, to apply to cases of voluntary payments and not to collections exacted by duress.*

In these cases of voluntary payment a taxpayer and a collector are mutually mistaken as to the effect of the limitations upon collection of taxes. To let the loss lie where it fell in such a case is not inequitable. *Joy Floral Company v. Commissioner of Internal Revenue,* 29 Fed.(2d) 865. To penalize those who were not in error and who resisted collection, insisting upon a proper interpretation of the law, is an inequitable construction.

The Commissioner has recognized that only such payments as are *voluntarily* made after the effective date of the Revenue Act of 1928, in cases where collections were stayed by abatement claims, come within the provisions of Section 611. See Instructions to Collectors, Mim. 3460, Cumulative Bulletin VII-2, p. 82 (Prentice-Hall (1930), page 19,344), where it is directed:

"Collection Not To Be Enforced.

"(1) Sections 607 and 611 do not authorize the Bureau to enforce collection of a tax in any case after the expiration of the period of limitations but merely prescribe the effect of the period of limitations against the United States upon any assessment or payment made after the expiration of the period of limitations applicable

thereto. Therefore, no attempt will be made to enforce collection of any outstanding assessment if the period of limitation within which collection can be made has expired, or to make any assessment of any tax if the period of limitation within which the assessment can be made has expired, or to enforce collection of any tax if the assessment was not made within the period of limitation prescribed for the making of the assessment and if no suit for collection without assessment was begun prior to the expiration of such period."

* * * * * * *

"Administrative Procedure.

"(a) The taxpayer will be advised by the Income Tax Unit of its rights under Section 611 of the Revenue Act of 1928, and unless it is disposed to make voluntary payment, within one year after the enactment of the said Act, after a full understanding of the meaning of such section an appropriate certificate of overassessment will be issued. * * *"

Thus, after the 1928 Act, the Commissioner refrained from compelling the payment of barred taxes, and yet, under that law, was unable to make administrative refunds of such taxes after a taxpayer had paid without compulsion. If this distinction between voluntary and involuntary payments is reasonable for the period after the enactment of the 1928 Act, it seems a reasonable distinction before, if that Act is to be given retroactive effect.

IV.

If Section 611 was intended to bar actions in the courts it is void as an attempt to take property without due process of law.

(a) *The protection afforded citizens by the Fifth Amendment to the Constitution, against Federal statutes which have the effect of taking property without due process of law, includes protection against statutes which recreate, or revive liabilities which have become extinguished through lapse of time. Danzer and Co. v. Gulf and Ship Island R. R. Co.*, 268 U. S. 633, 636. *Davis v. Mills*, 194 U. S. 451. *The Harrisburg*, 119 U. S. 199.

In these cases this Court distinguished the earlier case of *Campbell v. Holt*, 115 U. S. 620 (to the effect that limitations of the time for asserting common law liabilities might legally be changed or taken away altogether), saying that in *Campbell v. Holt* (involving a breach of common law liability on a contract) the limitation provisions applied "to the remedy only", but pointed out that other types of limitation "operate as a limitation upon *liability.*" The Court cited many cases in which liabilities were created by statute and limitations contained in the same or later statutes were held to bar not only the remedy but the liability itself. In the latter type of limitation, it is held that Congress lacks the power to revive the limitation, and thus revive the liability.

So, here, income taxes are statutory liabilities, and the limitations upon the collection thereof, contained

in the same or later Revenue Acts, are clearly limitations which not only bar the Government's remedy (i. e., the right to enforce collection) but extinguish the taxpayer's liability for the tax.

Legislative history fortifies the conclusion that these tax limitations are designed to protect the taxpayer from *claims* asserted by the Government, not merely to afford him a defense.

The purpose of the statutes of limitations upon the assessment or collection of taxes which have been placed in all Revenue Acts since the Revenue Act of 1917, has plainly been to provide a time when the sovereign and the citizen can close accounts on tax matters. This was well expressed by Mr. Hawley of Oregon, a member of the House Committee on Ways and Means, which drafted the Revenue Act of 1921. In speaking for the proponents of the measure, on the floor of the House, Mr. Hawley said (Congressional Record, Volume 61, page 5201) in reference to Section 250 (d) of the Revenue Act of 1921 that it was—"for the purpose of compelling the Government to close out its accounts with every taxpayer."

Continuing his address, Mr. Hawley stated:

> "A great many business transactions are suspended and are not consummated for the reason that the person intending to buy says: 'What liabilities are there on this property?' And, among others, there is stated to be a certain amount of tax in dispute. Men do not like to buy property, especially when the amount of tax in dispute is large. Many very important

transactions have been lost, and this will open up the way to their settlement."

That the purpose was simply this and not, as supposed by some courts which have construed Section 611 (see opinion in *Regla Coal Company v. Bowers, supra*) to force action before evidence became stale, is conclusively demonstrated by the successive reductions of the periods of limitation upon assessments and collections contained in the previous revenue acts. Compare Sections 250 (d) Revenue Act of 1918 (40 Stat. 1057, 1083) and 1921 (42 Stat. 227, 265), Sections 277 and 278, Revenue Act of 1924 (43 Stat. 253, 299) and 1926 (44 Stat. 9, 58, 59) and Section 275 of the Revenue Act of 1928, (45 Stat. 791, 856), under which the periods of limitation on assessment have been reduced from five to two years from the date the return was filed, and with a fixed limitation in recent years of six years from the date of assessment within which collection may be had. It is to insure that taxpayers may have order in their affairs, and to enforce expedition from the taxing authorities, that limitations upon collections of taxes are imposed, and when these periods have expired it has been the will of Congress that all further tax liability shall cease.

The foregoing seems to have been recognized recently by this Court in its decision in the case of *United States v. Updike*, U. S. Supreme Court Advance Opinions 1929-1930 (74 L. ed. —), page 536. This Court there said in reference to limitations on collection after valid assessment contained in Section 278 of the Revenue Act of 1926 (p. 539):

> "An actual assessment having been made, it must be assumed that the Government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought."

The limitations under consideration in the *Updike* case are founded in exactly the same policy as that which has existed since the first limitations upon collection were prescribed in 1918.

(b) *The proposition that the running of the statute extinguished the liability for the tax has formed a necessary basis for all decisions sustaining the right of citizens to sue collectors of internal revenue, and recover sums illegally exacted as taxes, after the statutory periods for collection had run.*

There are no statutes which specifically authorize suits against collectors in cases of this kind. Such actions are brought as common law actions in assumpsit, for moneys had and received, and are personal to the collector, and not against his office. *Smietanka v. Indiana Steel Company*, 257 U. S. 1; *Levy v. Wardell*, 258 U. S. 542.

Such actions retain their common law basis, notwithstanding the statutory provisions for proceedings before the Commissioner of Internal Revenue required as conditions precedent to suit (Sections 3226 and 3228, Revised Statutes) and those statutes which provide

for the conversion of a judgment against a collector to one against the United States, and its repayment. Sections 989 and 3220, Revised Statutes; *Patton v. Brady*, 184 U. S. 608; *Sage* v. *United States*, 250 U. S. 33.

Actions in assumpsit for money had and received depend upon the fact that the person taking the same had no right thereto. The only basis upon which recoveries could have been recognized in *Graham v. Dupont, supra*, and allowed in *Bowers v. New York & Albany Lighterage Company, supra*, was that the citizen did not owe the sum exacted as a tax, at the time collection was forced.

Limitations which bar the remedy only are matters of *defense*, and do not form a basis for affirmative actions such as are here involved. This precise question was raised in *Bashara v. Hopkins*, 290 Fed. 592, 595, where the taxpayer sued to enjoin a forcible collection by distraint after the statutory period for collection had run, on the ground that while this fact was open to him as a defense in a *suit* to enforce collection it was not available as a basis for recovery after collection by distraint. The district court held, as did this Court in *Graham v. Dupont*, that injunction would not lie since the citizen had a right to sue the collector and recover after collection by duress was had, distinguishing this type of case from *Campbell v. Holt, supra*, by the fact that the running of the statute extinguished the liability.

Compare, also, *Citizens Bank v. Miller-Link Lumber Company*, 16 Fed.(2d) 163, holding that a claim for

taxes against an insolvent taxpayer could not be presented by way of intervention in receivership proceedings after the expiration of the period of limitations upon collection; the case of *United States v. John Barth Company*, 27 Fed.(2d) 782, holding liability under a bond given to stay collection of a tax, extinguished by the running of the statutory time for collection (reversed by this Court on another ground, 279 U. S. 370); and *Joy Floral Company v. Commissioner*, 29 Fed.(2d) 865, holding that a waiver given after the period of limitation on collection was of no effect. The decision of the Court of Claims in the case of *Stange v. United States*, — Ct. Cls. —, Prentice-Hall 1929 Federal Tax Service, Par. 1715, which is contrary to the foregoing, is now before this Court on certiorari (No. 23, October Term, 1930).

Congress has recognized this to be the effect of limitations on tax collections, for Section 1106(a) of the Revenue Act of 1926 expressly provided that:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability * * * ."

As has been shown elsewhere in this brief (pp. 12-13), this provision was intended merely to be declaratory of the law, as it had always been, and was enacted to offset a contrary holding by the Court of Claims in the case of the *Toxaway Mills v. United States*, 61 Ct. Cls. 363, as was recognized by the Solicitor General in the case of *Chapman v. United States, supra.*

In this connection the recent decision of the Supreme Court of the State of Pennsylvania in the case of *Wettengel v. Robinson et al.*, C. C. H. 1930 Standard Fed. Tax Service Par. 9360, decided May 12, 1930, is of interest as that Court plainly recognized the distinction between ordinary statutes of limitation and provisions limiting collections of taxes contained in the Federal revenue laws, and held that the attempted retroactive repeal of Section 1106 of the Revenue Act of 1926 by Section 612 of the Revenue Act of 1928 was inoperative as to any taxes which had become barred prior to the passage of the Revenue Act of 1928. The reasoning of this case is sound, and, since the tax in the instant case became barred prior to the Revenue Act of 1928, it would seem that Section 1106 in and of itself operated to destroy whatever liability might have existed without taking into consideration the provisions of said section.

This court has held that limitations upon the time within which suits may be brought to recover taxes erroneously or illegally collected, are substantive, and not mere matters of limitations to be raised as a defense. (*Cheatham v. United States*, 92 U. S. 85; *Arnson v. Murphy*, 115 U. S. 579, 586.) If limitations against the taxpayer are more than mere procedural limitations, then limitations against the taxing agencies of the Government ought to be similarly construed.

The Courts which have construed Section 611 as operating merely to withdraw the *defense* of the statute of limitations, upon authority of the decision in *Camp-*

bell v. Holt, supra, have wholly failed to show how a mere matter of defense can form the basis for an affirmative action in assumpsit. It seems to have been assumed in those cases (*Wright & Taylor v. Lucas, supra; Regla Coal Company v. Bowers, supra;* and *Oak Worsted Mills v. United States,* 68 Ct. Cls. 359), that actions against collectors in such cases are in themselves founded upon the limitations provisions of the revenue laws. Such is not the case, as these limitations refer solely to the administrative matter of collecting taxes and make no provisions for suits for recoveries of sums collected in violation of such provisions.

(c) *Section 611 was not intended as a ratification of illegal collections of taxes made after the statutory period therefor.*

This Court has sustained the power of Congress to ratify illegal acts of collectors of public revenues, and to do so even though suits for the recoveries of moneys so illegally collected were pending at the time the ratifying statutes were passed. *United States* v. *Heinszen,* 206 U. S. 370. *Rafferty* v. *Smith, Bell and Company,* 257 U. S. 226.

In these cases, however, there were involved statutes which *expressly* ratified the illegal collections and were susceptible of no other meaning. In the *Heinszen* case this Court pointed out that, while Congress could ratify illegal collections, "it is not to be presumed to do so on language which, literally taken, has a narrower sense" citing its decisions against implied ratifications in *Lincoln* v. *United States,* 197 U. S. 419 and *De Lima* v. *Bidwell,* 182 U. S. 1.

The language employed in Section 611, literally taken, has a much narrower sense than ratification, and when given effect in the narrower sense is productive of every result which the legislative history of the Section shows was intended to be achieved by the Congress, through said Section, to-wit, the making of credits or refunds by the Commissioner of Internal Revenue, leaving to the courts the question of the effect of "collections stayed by claims in abatement" upon rights of taxpayers to recover sums alleged to have been illegally collected.

Under such circumstances ratification is not to be presumed to have been intended.

Congress lacked the power to ratify illegal collections at the time Section 611 was enacted.

The situation existing when Section 611 of the Revenue Act of 1928 was enacted, and that involved in *United States* v. *Heinszen, supra,* and *Rafferty* v. *Smith, Bell and Company, supra,* were very different.

In the latter cases certain tariff duties had been exacted upon imports to and from the Phillipine Islands at times when Congress had passed no laws laying such taxes. Later Congress, by special enactment, expressly "legalized and ratified" the duties collected, and the collection thereof. In the cases cited this Court sustained the ratifications upon the ground that Congress had at all times the power to lay the taxes and to provide for the collection actually had. That this was the basis for these decisions was stated in the opinion of this Court in *Forbes Pioneer Boat Line* v. *Everglades Drainage District,* 258 U. S. 338, 339, where the rule was stated to be that:

"* * * A tax may be imposed in respect of past benefits, so that if, instead of calling it a ratification, Congress had purported to impose the tax for the first time, the enactment would have been within its power."

Section 611 of the Revenue Act of 1928, does not purport to lay a tax for the first time. It presupposes that a tax has been laid by appropriate enactment, and has been ascertained and lawfully assessed against the individual taxpayers. If it has any effect as a ratification it is a ratification of collection only.

But the tax laid had been *extinguished* by the expiration of time limitations made part of the tax, by the same agency which laid the tax, and before the collection may be ratified the tax itself must be revived. The Circuit Court of Appeals for the Third Circuit in its recent opinion (July 9, 1930) in the case of *Heiner v. Erie Coal and Coke Company*, (C. C. H. Standard Federal Tax Service, 1930, page 8889) was unable to find anything in Section 611 which operated to revive a barred liability for a tax.

The power to revive a tax, like the power to ratify, may be exercised only if the rights of private parties have not intervened. *Stockdale* v. *Life Insurance Company*, 87 U. S. (20 Wall.) 323. But, as has been recognized by this Court, citizens who have suffered wrongful exactions of money by collectors of internal revenue, acting without the scope of their office, do have rights enforcible against said collectors, as individuals. This bars a revival of the tax since such rights of action are property within the meaning of the Fourteenth and Fifth Amendments to the Constitution.

In *Gilbert* v. *Ackerman*, 159 N. Y. 118, the Court of Appeals of the State of New York aptly stated the rule as follows:

> "The right possessed by a person of enforcing his claim against another is property and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law."

In the case of *Angle* v. *Chicago etc. Railway Company*, 151 U. S. 1, 19, Mr. Justice Brewer, speaking for this Court, said as follows:

> "A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."

The case of *Forbes Pioneer Boat Line* v. *Commissioner, supra,* is in point. There the plaintiff was the owner of a boat. He made use of a canal in the State of Florida to secure passage for his boat. The Commissioners of the Drainage District, through which the canal ran, exacted a toll for this service. The plaintiff paid the toll under duress and then sued for its recovery. The collections of toll were illegal when made but the Legislature of the State of Florida, while plaintiff's action was pending, attempted to correct the

situation by passing an Act imposing the toll as of the date when the plaintiff had used the canal, and the defendants set up this new Act of the Legislature as a defense. This Court held that the Legislature could not validate the illegal acts of the Commissioners in this manner, holding that the plaintiff's right of action to recover the illegally collected toll could not be taken from him by subsequent legislation in view of the provisions of the Fourteenth Amendment prohibiting the taking of property without due process of law.

(d) *If intended as a ratification of illegal collections in cases where collection was stayed by claims in abatement, Section 611 operates in such an arbitrary and discriminatory manner as to constitute confiscation of private property.*

If Section 611 be a ratification or revival of barred taxes it is valid or invalid by the same tests which are applied to taxes when laid in the first instance. It is well settled that Congress for all its broad powers to lay taxes must act in that respect so as to produce results conformable to the purposes of taxation, and its enactments which go beyond this and are so arbitrary and discriminatory as to amount to confiscation will not be sustained. *Brushaber v. Union Pacific Railroad Company*, 240 U. S. 1; *Nichols v. Coolidge*, 274 U. S. 531; *Blodgett v. Holden*, 275 U. S. 142.

This is especially true as to the classification of the persons subject to the tax as decided by this court in the case of *Schlesinger v. Wisconsin*, 270 U. S. 230, where it was said:

A classification for the purposes of taxation must rest upon some reasonable distinction.

It seems probable that Congress, if it possessed the power to revive an extinguished tax, might do so as to *all* taxes laid and assessed, but not theretofore collected. In such cases it would be reasonable to retain all moneys illegally collected after the statutory period therefor and to require collection of all unpaid assessments. That is not the situation created under Section 611, as construed by the court below, or under any possible view of said section, as a ratifying statute. Nor does Section 611 even operate to remove the benefit of the statute of limitations from all who had by their own acts "stayed" collections of the tax. Instead, only one out of five types of cases where collections have been "stayed" is reached by the section.

(1) Section 611 does not authorize the retention of moneys illegally collected where collection was stayed by claims for credit (G. C. M. 6296—Cumulative Bulletin VIII-35-4326).

(2) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the Revenue Act of 1928. (I. T. 3660—Cumulative Bulletin VII-2, p. 82).

(3) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(4) Section 611 does not authorize collection to be made from those who stayed collection by claims in

abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period therefor.

Section 611 applies only to moneys wrongfully gotten and in the possession of collectors or the Treasury, when the Revenue Act of 1928 was passed, or sums voluntarily paid within one year thereafter, thereby disclosing the true purpose of the Section (as construed by the court below) to be to *confiscate* that which is at hand, not to acquire by taxation that which was formerly due, but which, due to the Government's own mistake of law (*Bowers v. New York & Albany Lighterage Company, supra*) was not collected in time.

Section 611, as construed by the court below, goes beyond the ordinary meaning of the terms employed therein, produces harsh and inequitable results, and is unconstitutional. If construed as relating only to administrative refunds and credits and not to actions in the courts, effect is given to the terms employed in their ordinary sense and meaning, and a result within the power of Congress to provide is reached. The latter construction should be adopted by this Honorable Court.

On June 2, 1930, the United States Court of Claims decided the case of *Wyman, Partridge Company v. The United States,* (No. J-352), reported in Prentice-Hall (1930) Federal Tax Service, par. 1209, and C. C. H. (1930) Standard Federal Tax Service, page 8765, and distinguished that case from its decisions in the cases previously decided by it on this point (*Oak*

Worsted Mills v. The United States, 68 Ct. Cls. 359, and *Gotham Can Company v. The United States,* 68 Ct. Cls. 749), in that the illegal collection in the *Wyman, Partridge Company* case occurred after the enactment of the 1926 Act, whereas, in the two other mentioned cases, as well as in the case herein, collection occurred prior to that Act, which contained a provision in Section 1106(a) thereof that the running of the statute of limitations extinguished the liability as well as the remedy.

We believe the holding should have been for the taxpayer in both classes (collection before the 1926 Act became effective, and collection after it became effective), and that the court's failure so to hold was due to its misunderstanding of this Court's opinions as to whether an ordinary statute of limitation in the taxing act destroys the liability, the remedy, or both.

The Court, in the *Wyman, Partridge case,* was of the opinion that Section 1106(a) was not retroactive, but did not give any consideration to the claim that Section 611 was not intended to be retroactive.

Respectively submitted,

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Amici Curiae.

922 Southern Building, Washington, D. C.

APPENDIX.

The House Committee on Ways and Means, in House Report No. 2, 70th Congress, 1st Session, p. 34, referred to Section 611 of the Revenue Bill of 1928 as follows:

> "Prior to the enactment of the Revenue Act of 1924, it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the Collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defence of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other over-payment."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 36

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A COPARTNERSHIP, PETITIONERS,

vs.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA, RESPONDENT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ AND BRIEF OF AMICI CURIÆ.

ROBERT A. LITTLETON,
JOHN C. ALTMAN,
ABRAHAM LOWENHAUPT,
STANLEY WAITE,
Counsel for Fred Medart Manufacturing Co., Pacific Porcelain Ware Co.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Fred Medart Manufacturing Company of St. Louis, Mo., and Pacific

Porcelain Ware Company of San Francisco, California, having cases pending involving identically the question involved in the above-entitled case, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiæ*.

ROBERT A. LITTLETON,
JOHN C. ALTMAN,
ABRAHAM LOWENHAUPT,
STANLEY WAITE,
Counsel for Fred Medart Manufacturing Co., Pacific Porcelain Ware Co.

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIÆ.

Statement.

The case was tried before the District Court, for the Southern District of California, which decided in

favor of the petitioner (R. 15-19), upon a motion for judgment upon the stipulated facts. The Circuit Court of Appeals, in an opinion rendered November 4, 1929 (R. 36), and reported in 35 Fed. (2d) 586, reversed the decision of the District Court, on the ground that Section 611 of the Revenue Act of 1928, which had not been relied upon below, barred recovery by the petitioner. Certiorari was granted by this Court on March 3, 1930.

The facts are as follows: In 1920 the Commissioner of Internal Revenue assessed additional income taxes for the year 1917, and the taxpayer filed in the same year a claim to abate (that is, cancel) this assessment. This claim was pending until December 22, 1922, when the Commissioner denied it. During the interval after this disposition of the claim in 1922 and before March 22, 1923 (on which date the statute of limitation ran against collection by the Government), the Commissioner failed to collect. In 1924, the Government, disregarding the statute of limitations, forced the taxpayer to pay the assessment. The petitioner has sued herein to recover back the sum so paid under duress. The respondent contends that (in spite of the fact that the tax was collected after it was barred) Section 611, Revenue Act of 1928, prevents the taxpayer from recovering in this action. The petitioner contends that Section 611 has no such effect.

Provisions of Law.

The assessment of the tax involved in this case was made *during 1920* under the provisions of Section

9 (*a*) of the Revenue Act of 1916 (39 Stat. 756-77 c. 463), as amended by the Revenue Act of 1917 (40 Stat. 300-38, c. 63).

Section 9 (*a*) of the Revenue Acts of 1916 and 1917 *supra*, reads as follows:

> "That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said amounts shall be paid on or before the fifteenth day of June, except in cases of refusal or neglect of make such return and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, or has been made, make a return upon information obtained as provided for in this title or by existing law, or require the necessary corrections to be made, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the fifteenth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid, and interest at the rate of one per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons."

It will be observed that assessments made under the foregoing provision of law were summary in char-

acter. That is, no procedure was prescribed whereby the Commissioner was required to notify taxpayer that he was about to assess an additional tax against him. When such summary assessment was made, it was the duty of the Commissioner to proceed with the collection of same. However, there were general provisions of law, Section 3220, Revised Statutes, which authorized the Commissioner of Internal Revenue to *remit*, refund, and pay back to taxpayer all taxes erroneously or illegally assessed or collected.

Under said Section 3220, Revised Statutes, the Commissioner of Internal Revenue was authorized to receive from the taxpayer a claim for the *remission of such tax summarily assessed*, or for the *abatement* of such assessment before collection. Where assessment was seasonably made, there was no limitation on collection by distraint proceeding. Also, if no assessment was made within three years, any amount finally determined by the Commissioner to be due as a tax could be collected at any time by suit in court therefor. But in a case where assessment was seasonably made, it was optional with the Commissioner as to whether he should proceed to collect by distraint proceedings or suit in court.

In a case where a summary assessment was seasonably made the Commissioner of Internal Revenue adopted the policy of receiving from taxpayers claims for the remission or abatement of such tax and assessment, rather than enforcing payment by distraint, and then receiving a claim for refund or repayment of tax, if same be erroneously and illegally assessed and collected.

Under the foregoing procedure, the collection of a tax by distraint or proceeding in court was not *stayed* by the filing of a claim for remission or abatement; but, with the option of the Commissioner and Collector, were merely *delayed.*

The above procedure, as briefly outlined, is historical in the collection of the revenues of the Government prior to the date of the passage of the Revenue Act of 1918 (40 Stat. 1057-96 c 18).

Section 9 (*a*) of the Revenue Act of 1917, *supra,* also provides that the tax shown to be due on returns filed by taxpayers for the taxable year 1917, shall be *assessed* on or before the first day of June of each successive year, and the taxpayer notified of the amount of said assessment which was payable on or before the 15th day of June. Section 1009 of the Revenue Act of 1917 gave the taxpayer the right to make an estimate of his tax liability at the time return was filed, and pay said estimated tax in installments; and upon subsequent determination and assessment by the Commissioner of *actual tax due,* any amount overpaid by taxpayer under said estimate would be refunded. The assessment that the Commissioner ultimately made was original and not a *deficiency assessment.* "All assessments" which would include any "deficiency assessment" were required to be made within three years after the return was filed; except in cases of refusal or neglect to make such return, or in cases of erroneous, false, or fraudulent returns, in which cases, upon discovery thereof, assessment could be made at any time (Section 14 (*a*) of the Revenue Act of 1917, *supra*).

Section 250 of the Revenue Act of 1918 established an entirely new procedure for the collection of taxes imposed thereby. Said Section, paragraph (*d*), for the first time in the history of the Government, prescribed a limitation on collection as well as assessment of taxes. The limitations thus prescribed were five years from the date the return was filed or was due. Those limitations ran concurrently (*Bowers* vs. *New York and Albany Lighterage Co.*, 373 U. S. 346 *et seq.*). In returns prepared for taxpayers under the Revenue Act of 1918, there was contained "a notice and demand" for immediate payment of tax shown to be due thereon. That is, in filing a return there was contemporaneously with such event, an assessment of the tax shown to be due thereon, which could be paid in one lump sum or by four equal installments.

Section 250 (*a*) of the Revenue Act of 1918 provides:

> "That except as otherwise provided in this section and sections 221 and 237 the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after the time fixed by law for filing the return.
>
> "The tax may at the option of the taxpayer be paid in a single payment instead of in installments, in which case the total amount shall be paid on or before the time fixed by law for filing

> the return, or, where an extension of time for filing the return has been granted, on or before the expiration of the period of such extension."

Within five years after the filing of returns by taxpayers under the Revenue Act of 1918 the Commissioner *was required* to make an examination thereof and *determine* and assess any additional tax found to to be due; and *no suit* or *proceeding* for the collection of *any tax* shall be begun after the expiration of said five years from *date return was due or was filed.*

Section 250 (*d*) of the Revenue Act of 1918 provides:

> "Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under *any* return shall be determined and assessed by the Commissioner within five years after the *return was due or was made,* and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due." (Italics ours.)

There were no instructions contained in the Revenue Act of 1918, in reference to how the Commissioner should proceed in the examination of returns filed under that Act. It was evidently thought by Congress that when the Commissioner was given a period of five years to do a thing, he would devise such machinery as would fit the frame, and that no undue hardship

would result either to the taxpayer or the Commissioner. Under the provisions of Section 250 (*d*) of the Revenue Act of 1918 the Commissioner could perhaps continue to make *summary* assessments if he desired to stimulate the taxpayer to action, or if any danger in reference to insolvency or departure from the country of the taxpayer was imminent, which might jeopardize collection. In case of such summary assessment of an alleged deficiency, the Commissioner could still employ the general provisions of law (Section 3220 of Revised Statutes) to remit, abate or refund any part of said summary assessment ultimately found not to be due. However, the expiration of the statute of limitation on collection was not a danger in reference to the tax that could be *stayed* by assessment, and filing of a claim for remission and abatement. When such bar fell, whether before or after assessment, it operated to put an end to the liability of the taxpayer for any additional tax.

If Section 250 (*d*) of the Revenue Act of 1918 had not been repealed by Section 250 (*d*) of the Revenue Act of 1921 (42 Stat. 227, c 136), no provision for the extension of the five year period for assessment and collection would have been provided for, and the expiration of the limitations on assessment and collection would have put an end to the tax (*United States* vs. *Russell*, 278 U. S. 181).

The assessment and collection of taxes for the year 1917 and prior years were not affected by the provisions of Section 250 of the Revenue Act of 1918. Taxes for those years were assessable and collectible under the provisions of law imposing them.

Section 250 of the Revenue Act of 1921, *supra*, passed *November 23, 1921*, is a general provision for the determination, assessment and collection of taxes, no matter whether imposed by that Act or prior Acts, providing for internal revenues of the Government.

Section 250 (*d*) of the Revenue Act of 1921, *supra*, provides as follows:

> "SEC. 250 (*d*) The amount of income, excess-profits, or war profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided*, That in the case of income received during the lifetime of a decedent,

all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: *Provided further*, That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due; *Provided further*, That in cases coming within the scope of paragraph (9) of subdivision (*a*) of section 214, or of paragraph (8) of subdivision (*a*) of section 234, or in cases of final settlement of losses and other deductions tentatively allowed by the Commissioner pending a determination of the exact amount deductible, the amount of tax or deficiency in tax due may be determined, assessed, and collected at any time; but prior to the assessment thereof the taxpayer shall be notified and given a period of not less than thirty days in which to file an appeal and be heard as hereinafter provided in this subdivision."

The effect of Section 250 of the Revenue Act of 1921 is that all internal revenue taxes imposed by the Act of August 5, 1909 (36 Stat. 113-18, c. 6), (excise tax on corporations) by the Act of October 3, 1913 (38 Stat. 116-81, c 16) (the first income tax law), covering the years 1909 to 1915, inclusive, would be and were forever barred from assessment and collection. That result is made clear by the explicit provisions of the

last paragraph of Section 250 (*d*) of the Revenue Act of 1921, which reads:

> "If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained; *Provided, That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing.*" (Italics ours.)

Any summary assessment made under any Act, prior to the Revenue Act of 1921, which was not barred by the five year period for collection prescribed in Section 250 (*d*), could of course be collected within such period prescribed, whether collection thereof, after assessment, had been delayed by a claim for remission or abatement, or such period for collection could be extended by a consent in writing signed by

the taxpayer and the Commissioner (250 (*d*), *supra*).

Congress knew that the assessment and collection of all taxes imposed by the Act of August 5, 1905, and the Act of October 3, 1913, were barred by the five year limitation prescribed in Section 250 (*d*) of the Revenue Act of 1921. Therefore, in prescribing the procedure to be thereafter followed by the Commissioner, as outlined in the last above quotation, subsequent examinations of the Commissioner were confined to returns made under the Revenue Act of 1916 (39 Stat. 756-77 c 463), the Revenue Act of 1917 (40 Stat. 300-38, c 63), the Revenue Act of 1918 (40 Stat. 1057-96 c 18) and the Revenue Act of 1921 (42 Stat. 227, 136).

Under the provisions of the Revenue Act of 1921, the right of the Commissioner to make summary assessments was taken away or specifically denied; and there was substituted therefor, the right to make a "jeopardy" assessment, if he believed that the *collection* of the amount due would be jeopardized by *delay* in making such collection.

The danger of collection which Congress must have had in mind, when it authorized the Commissioner to make an assessment, if the collection of the amount due was jeopardized, was not the danger of the expiration of the limitation on assessment, as provided in the first part of Section 250 (*d*), but the danger of collection because of *insolvency or departure of the taxpayer*. Such an assessment would have worked upon the taxpayer a hardship if collection be made; therefore, provision was made for the *stay* of such collection by the filing of a claim for remission or

abatement. Congress did not require that a bond for payment of such assessment be given, for the reason that the Commissioner's belief for the necessity of such assessment might develop to be erroneous, and it was left to his discretion or the discretion of the Collector as to whether security for payment should be demanded of the taxpayer.

The tax involved in the case at bar *was not assessed under the provisions of Section 250 (d) of the Revenue Act of 1921, and therefore, the claim for abatement did not stay collection as therein provided.* The claim for the abatement of that tax merely *delayed* collection of the assessment made *in 1920* under the Revenue Act of 1917, which was barred after the expiration of five years from the date the return was filed (*Bowers* vs. *New York and Albany Lighterage Company*, 273 U. S. 346).

Prior to the date of the passage of the Revenue Act of 1924, June 2, 1924 (43 Stat. 253 c 234), and the Revenue Act of 1926, February 26, 1926 (44 Stat. part 2, 9, c 27), the Commissioner of Internal Revenue had misconstrued and misapplied the limitation provisions contained in Section 250 (*d*) of the Revenue Act of 1921. He had proceeded upon the erroneous assumption that the limitation provision on collection barred only collection by suit in Court, and that where assessment was timely made, *collection by distraint proceeding could be made at any time.* That interpretation of the law was held to be erroneous in *Bowers* vs. *New York and Albany Lighterage Company* and *United States* vs. *Russell, supra.*

The Revenue Acts of 1924, 1926 and 1928 provide that where assessments are timely made, collection by distraint or suit in Court may be made at any time within six years after date of assessment. However, those Acts apply only to assesments made after the date of their passage, and assesaments made within the statutory period, the collection of which was not barred prior to the date of the passage of the Revenue Act of 1926.

Prior to the date of the passage of the Revenue Act of 1924, the Commissioner of Internal Revenue adopted the practice that in or about the month of February each year of making "wholesale" assessments of taxes which he designated as being "without compliance with Section 250 (*d*) of the Revenue Act of 1921". Just what "non-compliance with Section 250 (*d*) of the Revenue Act of 1921" meant, nobody seems to know. Presumably it was intended to mean that notice had not been given to taxpayer before such assessment was made. After such assessments were made, the Commissioner would invite the taxpayer to file a claim for abatement or remission as authorized by Section 3220 Revised Statutes. If such assessments were made because of the *imminence of the expiration of the bar on assessments,* no claim for abatement or remission, or bond to secure payment is authorized; but if they were made because of the fear of insolvency which *jeopardized* collection, a claim for abatement was authorized, which may or may not be accompanied by a bond for payment.

To sum up:

(1) Claims for abatement of assessments made *prior to the date of the passage of the Revenue Act of 1921* did not operate to *stay* collection, and any loss to the Government by reason of *delay* in collection which might have resulted, is due to the omission or neglect of officers of the Government, without any fault on the part of the taxpayer.

(2) Claims for abatement of assessments made without compliance with Section 250 (*d*) of the Revenue Act of 1921, made because of the immediate expiration of the period of limitation on assessment and collection of five years were not authorized, should not have been accepted, and did not *stay* or delay collection. Any loss to the Government due to a failure to collect in time is the result of the negligence of its own officials and not to anything done by taxpayers.

(3) Claims for abatement of assessments that were made with the idea of immediate collection of the tax because of its collection becoming "jeopardized" by reason of insolvency or some cause other than the expiration of the bar of the statute, were authorized by law, and operated to *stay* collection. If bond for the payment of the tax accompanied the claim, collection of the tax might have become barred, yet the penalty of the bond could be collected (*United States* vs. *John Barth Company*, 279 U. S. 370).

In a case of an assessment under conditions of (3) above, and a bond for payment did or did not accompany the claim, collection of the tax nevertheless became barred.

By Section 1106 (*a*) of the Revenue Act of 1926, *supra*, it is provided that the bar of the statute on collection does not only bar the remedy but extinguishes the liability of the tax. Therefore the imposition of all taxes, no matter by what Revenue Act imposed, which became barred from assessment and collection prior to the date of the repeal of 1106 (*a*) by Section 612 of the Revenue Act of 1928 (May 29, 1928) is completely extinguished.

By Section 611 of the Revenue Act of 1928, it is provided:

> "If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 611 of the Revenue Act of 1928, if within the power of Congress to provide for the collection of a tax whose imposition has been extinguished, without a specific reimposition thereof, may be applied only to the collection of a tax assessed under the conditions of (3) above, the immediate collection of which was *stayed* by the filing of a claim for abatement with or without bond. The assessment of such a tax could

be identified by proof in the possession of the Commissioner and when so identified, Section 611 of the Revenue Act of 1928 might be said to make a reimposition thereof and remove the bar on collection, if such collection be made within one year after May 29, 1928.

Section 611 of the Revenue Act of 1928 could not be made to apply to assessments made under conditions (1) and (2) above, because the claims for abatement thereof *were not authorized by law*, and under no circumstances could such claims be said to have *stayed* or delayed collection so as to identify the tax for reimposition after the original imposition is extinguished by the bar on collection.

The effect of Section 1106 (*a*) of the Revenue Act of 1926 is to repeal all prior Acts imposing taxes in cases where the assessment and collection of the taxes thus imposed had become barred by the statute of limitations applicable thereto. In *Meriwether* vs. *Garrett*, 102 U. S. 498 (26 L. Ed. 179), at page 514 (L. Ed. p. 205), the Court said:

> "A repeal of the law under which the tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provisions for its continuance is made in the repealing Act, though the tax may be revived and enforced by subsequent legislation."

There is no revivor of the tax in this case by subsequent legislation; Section 611 of the Revenue Act of 1928 may not be so construed. It must be limited to embrace only such tax, the jeopardy assessment of which was authorized by Section 250 (*d*) of the Reve-

nue Act of 1921. The tax in this case was not assessed under the provision of Section 250 (*d*) of the Revenue Act of 1921.

This is not a proper case for the Court to decide the question of whether a taxpayer has a vested right in the bar of the statute; that question may only be settled in a case arising under the conditions of (3) above, in which the tax sought to be collected or retained may be identified by proof by the Government as being a tax, the collection of which was *legally stayed* by the filing of a claim for abatement with or without bond.

There is in this case no imposition or levy of the alleged tax collected, and no provision of law to authorize the collection thereof. The collection being made without authority in law, it is erroneous, and the amount so collected should be refunded.

It is important to the general public that the Court so hold and decree in this case.

Respectfully,

ROBERT A. LITTLETON,
JOHN C. ALTMAN,
ABRAHAM LOWENHAUPT,
STANLEY WAITE,
Amici Curiæ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

R. E. GRAHAM and E. E. FOSTER, copartners, doing business under the firm name of Millie Francis Oil Company, a copartnership,

Petitioners,

vs.

REX B. GOODCELL, former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF.

WAYNE JOHNSON,
50 Broadway,
New York City.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

R. E. GRAHAM and E. E. FOSTER, co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a copartnership,
Petitioners,

against

REX B. GOODCELL, former collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California.

No. 36.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

The undersigned respectfully moves the Court for leave to file the accompanying brief in this case as *amicus curiae*.

This application is made as counsel for Marshall-Wells Company, a corporation of Duluth, Minnesota, which now has pending before the United States Court of Claims a suit for the recovery of 1917 income taxes in which suit

are presented two of the important questions presented in this case, namely whether Section 611 of the Revenue Act of 1928 is applicable to a state of facts such as the facts in this case, and if so whether Section 611 as so applied is constitutional. As in this case, the taxes in the Marshall-Wells Company case were collected after the expiration of the five year statute of limitations and the abatement claim filed by the Company was rejected prior to the expiration of the statute of limitations. Marshall-Wells Company, therefore, has as vital an interest in this case as the petitioners herein.

WHEREFORE, leave to file the accompanying brief is respectfully requested.

WAYNE JOHNSON,
50 Broadway,
New York City.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

R. E. GRAHAM and E. E. FOSTER, co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a copartnership,
Petitioners,

against

REX B. GOODCELL, former collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California.

No. 36.

BRIEF IN SUPPORT OF PETITIONERS.

Statement.

The petitioners filed their income and profits tax return for the year 1917 on March 22, 1918, and paid the taxes shown thereon to be due. In January, 1920, the Commissioner of Internal Revenue assessed additional 1917 taxes against the petitioners in the amount of $7,034.71. On February 11, 1920, the petitioners filed a claim in abatement of the additional assessment. On December 27, 1922, the abatement claim was rejected. The five year statute of limitations barred the respondent's right to collect the said additional taxes on March 22, 1923. The additional taxes were collected in two installments, one on November

29, 1924, and the other on December 3, 1924. Thereafter the petitioners duly filed a claim for refund and upon rejection brought suit to recover the said additional taxes on the ground that the collection of same was illegal because made after the expiration of the five year statute of limitations. The court below held that by reason of the filing of the aforesaid abatement claim petitioners were precluded from recovery by Section 611 of the Revenue Act of 1928.

Questions Presented.

Should Section 611 of the Revenue Act of 1928, by reason of the filing of the abatement claim, be construed to preclude petitioners' right to recover the additional taxes in suit; and if so is Section 611 constitutional when so construed?

The Statutes.

Revenue Act of 1928:

> *Section 607.* "Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."
>
> *Section 611.* "If any internal-revenue tax (or any interest, penalty, additional amount or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed,

with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

ARGUMENT.

I.

Section 611 does not apply to this case because here the abatement claim was rejected before the statute of limitations had run.

It is respectfully submitted that Section 611 of the Revenue Act of 1928 is not applicable to the case at bar because here the abatement claim was rejected and disposed of before the statute of limitations had run on the collection of the tax. Section 611 was intended to and should be construed to apply only to those cases where the abatement claim stayed the collection of the tax until after the statute had run.

In this case the return for 1927 was filed on March 22, 1918. The taxes in suit were assessed in January, 1920. The abatement claim was filed on February 11, 1920, and was rejected on December 27, 1922. The statute of limitations on the collection of the tax did not expire until March 22, 1923. The tax was not collected until November and December, 1924. Thus the abatement claim was rejected and out of the case three months before the statute expired and two years before the tax was collected.

The purpose of Section 611 was to prohibit recovery in those cases where the statute of limitations had run against the collection of taxes *while abatement claims were pending.* The practice of the Treasury Department had been to delay collection of taxes until claims in abatement could be acted upon, it being assumed at that time that there was no limitation on collection once the assessment was made. This assumption was held erroneous in *Bowers* v. *N. Y. & Albany Lighterage Co.,* 273 U. S. 346, the result being in many cases that the limitation on collection expired while the claim in abatement was pending. It was considered unjust that a taxpayer should be permitted to recover a tax on the ground that it was collected after the running of the statute when in fact the statute expired while the collection of the tax was stayed by an abatement claim filed by the taxpayer. To meet this situation Section 611 was enacted. See *Regla Coal Co.* v. *Bowers,* 37 Fed. (2d) 373, also *Oak Worsted Mills* v. *U. S.,* U. S. Crt. Cls. 36 Fed. (2d) 529 and *Daniel Reeves, Inc.* v. *Anderson,* C. C. A. 2nd Cir. July 21, 1930.

In view of its purpose, Section 611 should have no application to a case such as the instant one where the delay in collection was due to reason other than the filing of an abatement claim. In this case final action was taken on the abatement claim in December, 1922. The tax was not collected until November and December, 1924. The statute of limitations did not expire while the claim was pending. It did not expire until three months after the claim was rejected. After the claim was rejected the Government delayed collection for two years. The delay after rejection of the abatement claim was not interposed by the petitioners. It was a voluntary delay by the government for which the petitioners cannot be held responsible.

Section 611 was intended as an estoppel to those taxpayers whose abatement claims were pending until after the statute of limitations had run against collection. Its object was to estop a taxpayer from relying on the statute of limitations for recovery when by his own act in filing and prosecuting an abatement claim he sought and obtained a stay of collection *until the statute had run.* The section was intended to apply only

> "to those cases where the taxpayer by filing a plea in abatement had succeeded in delaying the case over the period of limitations and then sought to take advantage of the favor that had been granted him."

Oak Worsted Mills v. *U. S., supra; Wright & Taylor, Inc.* v. *Lucas,* 34 Fed. (2) 328. The petitioners were not such a taxpayer for in this case the abatement claim was disposed of several months before the statute expired.

The stay referred to in Section 611 means a stay due to and in fact resulting from an abatement claim filed by the taxpayer. *Regla Coal Co.* v. *Bowers, supra.* A stay or delay due to any other cause is not comprehended by the Section. This is the official interpretation placed upon the Section by the Treasury Department. In published rulings of the General Counsel of the Bureau of Internal Revenue (G. C. M. 4879, C. B. VII.—2, page 90, and G. C. M. 5665 C. B. VIII—1 p. 130) it is held that Section 611 does not apply when collection of the tax became barred prior to the date of the filing of the abatement claim. The General Counsel says:

> "The filing of a claim in abatement does not in and of itself satisfy the provisions of that section (Section 611). Its provisions are applicable only if

a timely assessment was made prior to June 2, 1924, and *if upon the filing of a claim in abatement, collection was stayed.* Here such a timely assessment was made, but collection of the tax became barred prior to the date of the filing of the claim. Consequently the legal right to enforce collection of the tax was never stayed, as the result of the claim being filed. The phrase 'collection * * * was stayed' as used in Section 611 clearing presupposes the legal right to collect, and the provisions of that section are not applicable when, if payment had been made at the time of the filing of the claim, it would have constituted an overpayment of the tax as defined by section 607." G. C. M. 4879, *supra.*

If no abatement claim is filed or if an abatement claim is filed but does not stay the collection, Section 611 does not apply. It follows that when, as in the present case, an abatement claim is filed *but is rejected several months before the statute runs* Section 611 should not apply.

The rule laid down by Section 611 is directed to a certain class of cases and the Section should not be applied to the present case which is clearly outside that class. The reason for the rule is known and the rule should not be applied where the reason for the rule does not exist.

II.

If Section 611 applies to this case, the Section is unconstitutional.

Section 611 arbitrarily and unreasonably discriminates between taxpayers of the same class, if it applies to facts in this case. It violates the constitutional requirement that all persons similarly circumstanced must be treated alike.

The government contends that it purports to ratify illegal exactions made *before* its enactment but must admit that it fails to authorize the collection of similar taxes *after* its enactment. Under this construction of its provisions a taxpayer, such as the petitioners, who paid the illegal tax on the demand of the collector is barred of recovery, while another taxpayer, identically situated except that he failed or refused to pay the tax up to the time of enactment of Section 611, is not required to pay. That such is the case appears clearly from the legislative reports when the bill was pending.

The following is a part of the report of the Conference Committee of the Senate and House on this section of the 1928 Act (H. R. Report No. 1882, 70th Congress, 1st Session, pp. 22-23):

> "Amendment No. 190: The House bill (sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without a bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter *paid*, such amount should not be refunded, solely because of the fact that it was paid after the running of the statute, *and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in court begun within one year after the enactment of the new law. The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection.*"

Section 611 as finally enacted did not purport to, was not intended to, and does not authorize the *collection* of a barred tax. The Bill as it left the House contained such a provision in the following language:

> "(b) A distraint or a proceeding in court for the collection of such part may be begun within one year after the enactment of this Act."

But that provision was purposely omitted from the final Bill. It was stricken out by the Senate because of its doubtful constitutionality. This appears from the debates in the House and in a statement by the ranking Democratic Member of the Ways and Means Committee, Representative Garner of Texas, referring to the effect in dollars and cents of Section 611 as originally proposed and as finally enacted. (Congressional Record, Vol. 69, p. 10136):

> "• • • It meant $30,000,000 refund of taxes and $70,000,000 to be collected in the future from taxpayers. That was the basis of the $100,000,000 loss. When we got into conference we could not get the Senate to recede. We finally tied up on two questions—the furniture outfit and 611. I believe in telling how we do these things. We tied up on them. We wanted the Senate to recede from both, but they did not want to recede because some particularly selfish people were going to get the money. We do not believe in that, but the Senate does. The result is that we compromised. We made it 'original', and then we struck out subsection (b) of section 611, cutting out the $70,000,000 prospectively we were going to get, *because there was some doubt about the constitutionality of it*, and decided to keep the $30,000,000 that we had in the Treasury. That was the compromise between those two amendments, one of them cutting down and the other giving up the prospect of securing $70,000,000 in the future."

The $30,000,000 refund referred to taxes already paid and the $70,000,000 referred to collections authorized by the original draft. Because of constitutional doubts the final bill dropped the collection of the $70,000,000 but authorized the retention of the $30,000,000 already paid.

That Section 611 does not authorize the collection of barred taxes is recognized by the Treasury Department in an official ruling, Mimeograph 3660, published in Internal Revenue Cumulative Bulletin, VIII-2, at p. 821, which provides in part as follows:

> "Section 607 and 611 do not authorize the Bureau *to enforce* collection of a tax *in any case* after the expiration of the period of limitation, but merely prescribe the effect of the period of limitation against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto. Therefore, no attempt will be made *to enforce* collection of any outstanding assessment if the period of limitation within which collection can be made has expired, or to make any assessment of any tax if the period of limitation within which the assessment can be made has expired, or to enforce collection of any tax if the assessment was not made within the period of limitation prescribed for the making of the assessment and if no suit for collection without assessment was begun prior to the expiration of such period."

The result of Section 611, therefore, is that one taxpayer may not recover a tax collected after the running of the statute of limitations but *before* the enactment of the 1928 Act where an abatement claim was filed and the collection stayed; yet another taxpayer in the same position except that his tax was so stayed until *after* the enactment of the 1928 Act need not pay if the statute of limita-

tions has run. The section thus purports to ratify illegal exactions made before its enactment but fails to authorize the collection of similar taxes after its enactment. The statute would penalize those who respected the demands of the government, and paid, and would put a premium on recalcitrance. Or it may be said, under this statute the lucky escape; the unlucky pay. However good natural law that may be, we respectfully submit it is bad constitutional law.

Consider these cases: Two taxpayers filed their returns for 1917 on the same day in 1918; in 1919 additional taxes were assessed against each; both filed abatement claims and in each case collection was stayed until after the statutory period; both claims were rejected on the same day and demands on both taxpayers were served at once. One was trusting and relied upon the complete system of remedial justice so often referred to by the lower courts and affirmed by this court *vide Graham* v. *Dupont,* 262 U. S. 234. He honored the demand of the Collector, relying upon

> "his right to pay the tax and sue to recover it back and in such a suit to raise the questions * * * as to the bar of time against the assessment * * *."

The other was more astute. He fled the jurisdiction, or perhaps concealed his property. Or again, perhaps, he was merely lucky in that the Collector was not diligent and his case was lost in the thousands on the books for collection. It is notorious that this happened times without number. The first taxpayer is mulcted; by the statute the illegal collection is made legal. The second goes free because after *New York & Albany Lighterage Co.* v. *Bowers,* 273 U. S. 346, decided in February, 1927, no fur-

ther effort to molest him was made by the government and this statute effectively exculpates him.

We say that statute is unconstitutional. The taxpayer such as the petitioners who complied with the Collector's demand and paid the outlawed tax relying on the law announced by the courts is penalized while the taxpayer who skulked and delayed until February, 1927, is favored. The due process clause of the Fifth Amendment commands that Congress shall not so discriminate. There is not the slightest reason or justification, legal or moral, for the different treatment of these two taxpayers—they are in all material respects identically situated in their relations to the government and they must be treated alike. The attempted distinction is purely arbitrary and capricious.

The Constitution guarantees to all persons equal protection of the laws. As to the states this is accomplished by the Fourteenth Amendment and as to the Federal government by the due process clause of the Fifth Amendment. This guarantee requires that classification for taxation must be reasonable and not arbitrary and capricious; that classification must rest upon some ground or difference or distinction having a fair and substantial relation to the object of the legislation. It requires that all persons in the same class or similarly circumstanced shall be treated alike. A tax law is unconstitutional where the classification is illusory, arbitrary or capricious. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Barclay* v. *Edwards,* 267 U. S. 442; *Nichols* v. *Coolidge,* 274 U. S. 531; and see *Neuss Hesslein & Co.* v. *Edwards,* 30 Fed. (2) 620.

A tax law which discriminates as Section 611 does against diligent and obedient citizens and operates to the

advantage of those who delay and skulk is obviously whimsical and capricious and must be condemned as unconstitutional. It is as unsound legally as it is reprehensible morally.

Conclusion.

In conclusion, and for the reasons above set forth, it is submitted that Section 611 cannot be construed as applicable to a case such as the instant one where the abatement claim was rejected long before the statute of limitations on collections expired; that when so construed the section is so arbitrary, capricious and discriminatory as to violate constitutional restrictions on the taxing power and is therefore void.

Respectfully submitted,

WAYNE JOHNSON,
Amicus Curiae,
50 Broadway,
New York City.

October, 1930.

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Supreme Court of the United States

OCTOBER TERM—1930.

No. 36.

R. E. GRAHAM and E. E. FOSTER, Co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

against

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE ON BEHALF OF FRANKLIN W. M. CUTCHEON.

CARL TAYLOR,
ROLLIN BROWNE,
Amici Curiae.

TAYLOR, BLANC, CAPRON & MARSH,
CARTER T. LOUTHAN,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM—1930.

No. 36.

R. E. GRAHAM and E. E. FOSTER, Co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

against

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Mr. Franklin W. M. Cutcheon, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

CARL TAYLOR
ROLLIN BROWNE
Counsel for Mr. Franklin W. M. Cutcheon,
as *Amici Curiae.*

Supreme Court of the United States,
OCTOBER TERM—1930.
No. 36.

R. E. GRAHAM and E. E. FOSTER, Co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,
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REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae* on behalf of Mr. Franklin W. M. Cutcheon from whom the Collector of Internal Revenue for the First District of New York illegally exacted payment of income taxes for 1918 after the statute of limitations had barred the collection thereof. Mr. Cutcheon recovered judgment for the amount so exacted, in a personal action against the Collector, in the United States District Court for the Eastern District of New York. The case is now pending on appeal before the Second Circuit Court of Appeals. The defendant in that action has pleaded Section 611 of the Revenue Act of 1928 as a bar to recovery.

POINTS OF ARGUMENT.

POINT I.

Section 611 of the Revenue Act of 1928 was not intended to apply retroactively to any case where the refund claim was filed prior to its enactment.

POINT II.

Section 611 should not be construed as applicable to a personal action against a Collector to recover taxes illegally collected, particularly if it is construed as a withdrawal by the sovereign of its consent to be sued.

POINT III.

Section 250 (d) of the Revenue Act of 1921 extinguished the liability for taxes for the year 1917 upon the expiration of five years from the filing of the 1917 return.

POINT IV.

Section 611 of the Revenue Act of 1928, if construed as an attempt to deprive taxpayers of their vested rights in the completed bar of Section 250 (d) of the Revenue Act of 1921, is void under the Fifth Amendment to the United States Constitution.

POINT V.

Section 611 did not reimpose the tax in suit nor ratify the collection thereof.

POINT VI.

Section 611, if construed as reimposing the tax in suit or ratifying its collection, is void under the Fifth Amendment.

POINT I.

Section 611 of the Revenue Act of 1928 was not intended to apply retroactively to any case where the refund claim was filed prior to its enactment.

So far as we have been able to ascertain this point has not heretofore been presented to any court in any of the cases involving Section 611. We believe it is conclusive, and the succeeding Points II-VI have been added merely out of an abundance of caution.

The case at bar is not a suit for a refund of taxes overpaid or wrongfully assessed, but is a common law action against the Collector personally for money had and received, growing out of the illegal exaction by duress of money claimed to be due for taxes, but the collection of which at the time was barred and specifically prohibited by statute. The right to maintain actions against collectors personally for their wrongful acts was settled by this Court prior to the enactment of legislation providing for refunds by the Treasury Department or for suits against the United States for the recovery of taxes (see Point II, *infra,* pp. 9, 10). The petitioners' right to judgment against the respondent in the case at bar was settled by *Bowers* v. *New York and Albany Lighterage Company,* 273 U. S. 346. Section 1106 (a) of the Revenue Act of 1926 provided that "no credit or refund [of outlawed taxes] shall be allowed unless the taxpayer has overpaid the tax", but this provision had been judicially construed as applicable solely to departmental credits and refunds of taxes voluntarily paid, and not to actions against Collectors to recover moneys illegally exacted. (See *infra,* p. 11).

Therefore, prior to the enactment of the Revenue Act of 1928, the petitioners admittedly had a good cause of

action against the respondent, and the District Court so held, but the Court below reversed the judgment because of the provisions of Section 611 of the Revenue Act of 1928, which was enacted on May 29, 1928, during the pendency of the action. The Court below made no mention whatever of Section 716 of the 1928 Act and made only a passing reference to Section 607.

Sections 607, 611 and 716 of the Revenue Act of 1928, provide as follows:

> Section 607. *Effect of Expiration of Period of Limitation against United States.* Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.
>
> Section 611. *Collections Stayed by Claim in Abatement.* If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.
>
> Section 716. *Effective Date of Act.* Except as otherwise provided, this Act shall take effect upon its enactment.

Section 607, which took effect on May 29, 1928 (Sec. 716), provides that if a tax has been or should be paid

after the statute of limitations had barred it, such payment *"shall be* considered an overpayment and *shall be* credited or refunded to the taxpayer if claim therefor *is filed."* The phrases *"shall be* considered", *"shall be* credited or refunded" and "if claim therefor *is filed"* obviously refer to the future and, therefore, although Section 607 relates to cases involving assessments and payments made prior to its enactment, nevertheless, it relates to such cases *only where the refund claim "is filed" after its enactment,* and prescribes what *"shall be"* the Department's action thereon. Section 611 also speaks prospectively and provides that in certain cases the payment of such a tax *"shall not be* considered as an overpayment *under the provisions of Section 607";* that is to say, *"shall* [not] be credited or refunded if claim therefor *is filed".* Reading Sections 607 and 611 together, it is clear that, since Section 607 does not apply to refund claims filed prior to the enactment of the Act, and since Section 611 applies only to cases otherwise falling within the scope of Section 607, Section 611 also does not apply to refund claims filed prior to its enactment.

Paraphrasing Sections 607, 611 and 716 together will show at once that Section 611 was intended to apply only prospectively to the action to be taken by the Treasury Department after the enactment of the Act, on refund claims filed after the enactment of the Act. Thus paraphrased, these three Sections provide:

> Any tax assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto *shall be* considered an overpayment and *shall be* credited or refunded to the taxpayer if claim therefor *is filed,* but if any such tax was properly assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed,

> then the payment of such part (made before or within one year after the enactment of this Act) *shall not be considered as an overpayment* and *shall not be* credited or refunded, even if claim therefor *is filed. This provision shall take effect upon the enactment of this Act.*

The refund claim in the case at bar had been filed and rejected prior to the enactment of these sections. At the time such refund claim was filed and at the time it was rejected it should have been allowed under the law then applicable to the situation, but a statute which merely provides what action "*shall be*" taken if a refund claim "*is filed*" cannot reasonably be construed as having any effect upon rights already accrued by reason of action already taken upon refund claims theretofore filed.

This Court has held that a statute will not be construed retroactively unless such construction is imperatively required by the clear, unequivocal expression of an intention that it shall be so applied. See: *Russell* v. *United States,* 278 U. S. 181; *United States* v. *Magnolia Petroleum Company,* 276 U. S. 160; *Union Pacific R. R. Co.* v. *Laramie Stock Yards Co.,* 231 U. S. 190.

In the case last cited, this Court said at p. 199:

> "* * * the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' "

POINT II.

Section 611 should not be construed as applicable to a personal action against a collector to recover taxes illegally collected, particularly if it is construed as a withdrawal by the United States of its consent to be sued.

The taxpayer's cause of action is one against the Collector personally, based upon the common law and limited solely by Section 3226 of the Revised Statutes, which provides that prior to the institution of suit a claim for refund must have been filed with the Commissioner of Internal Revenue.

Long before taxpayers were given a right of action against the United States for the recovery of taxes, this Court affirmed their right to a personal cause of action against the Collector (*Elliott* v. *Swartwout,* 10 Pet. 137). It has also been stated that a repeal of the statute creating the cause of action against the United States, would not destroy the right of action against the Collector (*De Lima* v. *Bidwell,* 182 U. S. 1, 176-177; see also *Erskine* v. *Van Arsdale,* 15 Wall. 75; *Pacific Whaling Company* v. *United States,* 187 U. S. 447, 453). At common law such an action against the Collector personally did not lie where the tax was paid voluntarily, but only where it was collected under duress or paid under protest, but the 1924 amendment to R. S. 3226 (Sec. 1014, Rev. Act of 1924), dispensed with the necessity of duress or protest.

Prior to the enactment of the Revenue Act of 1928, R. S. 3220 gave taxpayers the right to a refund by the Commissioner of Internal Revenue of taxes *overpaid* or *excessive* or of taxes *illegally collected.* Section 607 of the Revenue Act of 1928 provided that a tax *paid* (i. e., even though correct in amount and paid voluntarily with-

out duress or protest) after the statute of limitations had run, should be considered an *overpayment* of tax and that such *overpayment* should be refunded by the Commissioner of Internal Revenue. In other words, Section 607 brought within the scope of R. S. 3220 certain cases not theretofore covered by it.

Section 611 merely withdrew from the scope of Section 607 (and therefore from the enlarged scope of R. S. 3220) cases where the taxes had been assessed prior to June 2, 1924 and abatement claims had been filed and collection stayed, by providing that in such cases the *payment* shall not be considered an *overpayment,* that is to say, *shall not be refunded by the Commissioner.* The taxpayer's remedy against the Collector for taxes illegally collected was complete without either Section 607 or Section 611 and also without R. S. 3220 and there is nothing in Section 611 which purports to take away that right, as Sections 607 and 611 speak only of refunding or crediting *payments* of taxes which are defined as constituting *overpayments.* Prior to the enactment of the 1928 Act, the Treasury Department had ruled, in conformity with the well-settled doctrine, that a payment under duress is not a payment but is an illegal exaction. (*General Counsel's Memorandum No. 2581,* Int. Rev. Cum. Bull., Vol. VI-2, p. 95.) This interpretation is borne out by the fact that while R. S. 3220 was amended by the Revenue Act of 1928 (Sec. 619-b) so as to harmonize it with Sections 607 and 611, R. S. 3226, relating to *suits* for the recovery of taxes, was not changed.*

The right to this common law cause of action against the Collector in this particular class of cases having been settled by this Court in *Graham* v. *Dupont,* 262 U. S. 234

* It is often said that a personal action against a collector for taxes illegally collected is based on R. S. 3220 and R. S. 3226. This is incorrect; the revised statutes do not confer the right, and R. S. 3226 alone circumscribes it.

and *Bowers* v. *New York and Albany Lighterage Company, supra,* "this affords a special reason for believing that if" Congress had intended to render nugatory or limit those decisions "it would have done so in clear words from which there was no escape", and "it is not to be presumed to do so on language which, literally taken, has a narrower sense;" (*Lincoln* v. *United States,* 202 U. S. 484).

Sections 607 and 611, read together, provide that a tax paid under certain circumstances shall not "be credited or refunded". This is very similar to the phraseology of Section 1106 (a) of the Revenue Act of 1926 which provided that under certain circumstances "no credit or refund shall be allowed". Prior to the passage of the 1928 Act, Section 1106 (a) of the 1926 Act had been construed by the courts, in accord with the Government's contentions, as applying only to departmental refunds of taxes voluntarily paid and as not affecting a taxpayer's right to maintain a personal action against a Collector to recover an outlawed tax illegally collected. See: *Thornhill Wagon Co.* v. *Noel,* 17 Fed. (2d) 407; *Ellay Co.* v. *Bowers,* 25 Fed. (2d) 637; *cer. den.* (after enactment of the 1928 Act) 277 U. S. 606.

When Congress used substantially the same language in the 1928 Act, it must be presumed to have used it with full knowledge of and acquiescence in the construction theretofore placed upon those words by the courts. See: *Kepner* v. *United States,* 195 U. S. 100, 124; *United States* v. *Mooney,* 116 U. S. 104, 106; *Diaz* v. *United States,* 223 U. S. 442, 454; *Logan* v. *United States,* 144 U. S. 263, 301.

The contention, which has been raised in a number of suits arising under Section 611, that the section is valid as a withdrawal by the United States of its consent to be sued, supports the interpretation of the statute for which we have just contended, *viz.,* that it does not affect per-

sonal actions against collectors, but merely the taxpayer's right to a Departmental refund, and possibly the right to bring suit against the United States itself for the recovery of the tax. The argument has no weight in cases where the Collector is sued personally, because the rule of *Railroad Company* v. *Tennessee*, 101 U. S. 337, and *Railroad Company* v. *Alabama*, 101 U. S. 832, that a sovereign may at any time withdraw its consent to be sued, even as to actions theretofore instituted, was held, in *United States* v. *Lee*, 106 U. S. 196, not applicable to suits against Government officers. See also *Minnesota* v. *Hitchcock*, 185 U. S. 373.

It is true that some suits against Government officers are considered in effect suits against the sovereign, but in *Sage* v. *United States*, 250 U. S. 33, this Court held squarely that a suit against a Collector of Internal Revenue to recover taxes illegally collected is not a suit against the United States, and this was reaffirmed in *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, where the contention that the possible allowance of a certificate of probable cause after the entry of judgment in such a case transforms the action into one against the United States was overruled. See also *Philadelphia Company* v. *Stimson*, 223 U. S. 605; *Belknap* v. *Schild*, 161 U. S. 10; *United States* v. *Lee*, 106 U. S. 196.

POINT III.

Section 250 (d) of the Revenue Act of 1921 extinguished the liability for taxes for the year 1917 upon the expiration of five years from the filing of the 1917 return.

Section 250 (d) of the Revenue Act of 1921 provides in part as follows:

> "The amount of income, excess-profits, or war profits taxes due under any return made * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed."

The tax in suit was assessed prior to the enactment of the Revenue Act of 1921 (November 23, 1921) but no proceedings had been instituted for its collection. The time for collection was governed by the 1921 Act (*Bowers* v. *New York and Albany Lighterage Company, supra*) and was not extended by the Revenue Act of 1924 or of 1926 (*Russell* v. *United States, supra;* Sec. 278 (e), Rev. Act 1926).

This Court held in *Graham* v. *Dupont, supra,* that a taxpayer may not enjoin the collection of a tax even upon a showing that the collection would be illegal, but that his only remedy is "to *pay* the tax, and sue to recover it back," and that in such subsequent proceedings he may raise the questions as to the bar of the statute as well as the correctness of the tax.

In *Bowers* v. *New York and Albany Lighterage Co., supra,* this Court held that a tax collected by distraint after it has become barred by limitations may be recovered in a suit against the Collector. Prior to this decision the Court of Claims had denied recovery in *Toxaway Mills* v. *United States,* 61 Ct. Cls., 363, where the tax was paid under duress and protest, on the ground that the statute of limitations on the collection of taxes merely barred the Government's remedy, but did not affect the taxpayer's liability to pay the tax and that, after the plaintiff had paid the tax, even though under protest, he could not predicate an affirmative cause of action on the bar of the statute. The Court of Claims relied upon *Campbell* v. *Holt,* 115 U. S. 620 and similar cases.

When this decision was handed down by the Court of Claims, the Revenue Act of 1926 was pending in Congress. Senator Reed of Pennsylvania, a member of the Senate Finance Committee, before which the act was then pending, thereupon submitted an amendment which in somewhat altered form became Section 1106 (a) of the Revenue Act of 1926 and which provided expressly that the bar of the statute of limitations against the United States in respect of any internal-revenue tax should not only operate to bar the remedy but should also extinguish the liability. In support of this amendment, Senator Reed made the following statement (Congressional Record, Vol. 67, part 4, p. 3531):

> "Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the collector may nevertheless issue his distraint and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he,

> being the plaintiff, cannot plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposterous result, it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue, and while I feel reasonably confident, with all respect to the Court of Claims, that that case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now."

The report of the House Conferees who reported out the amendment in its final form, contained the following explanation:

> "This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *United States*) although in a case representing the specific point, this opinion would probably not be followed by the Supreme Court. (See Taft, C. J., in *Graham* v. *Dupont*, 262 U. S., 234, 256, 258)." *House of Representatives Report No. 356, 69th Congress, 1st Session*, p. 55.

Thereafter the Toxaway Mills Company appealed to this Court whereupon the Solicitor General of the United States filed a confession of error and on that the case was reversed. (273 U. S. 781).

It therefore appears that Section 250 (d) of the Revenue Act of 1921 is a statute of limitations which did not effectively bar the remedy, because despite its provisions the Government was still able to collect the tax after the expiration of the period therein prescribed, and also if the taxpayer-debtor paid the tax after the expiration of the period of limitations, he could maintain an affirmative cause of action for its recovery. It cannot be said that such a statute "merely barred the remedy." If it did not extinguish the liability, it had little or no practical effect.

In *Citizens' Bank* v. *Miller-Link Lumber Co.*, 16 Fed. (2d) 163, and *Bashara* v. *Hopkins*, 290 Fed. 592, it was held that the limitation upon the collection of income taxes extinguished the liability for the tax. To the same effect, see *United States* v. *John Barth Co.*, 27 Fed. (2d) 782, reversed on other grounds, 279 U. S. 370.

The statute is not a general statute of limitations, but an integral part of the revenue laws and is therefore within the rule announced in *William Danzer & Company Inc.* v. *Gulf & Ship Island Railroad Company*, 268 U. S. 633; *Morgan's Louisiana & Texas Railroad & Steamship Company* v. *Cocke*, 273 U. S. 656; and *Peninsula Produce Exchange* v. *New York P. & N. Railroad Company*, 152 Md. 594; 137 Atl. 350; aff'd. 276 U. S. 599. *Davis* v. *Mills*, 194 U. S. 451, 454, disposes of the contention that, as to taxes for 1917 and prior years, the limitation was contained in a subsequent statute. (As to taxes under the 1918 Act, which are involved in many suits similar to the one at bar, Sec. 250 (d) of the 1921 Act merely replaced the substantially identical provision of Sec. 250 (d) of the 1918 Act).

It has been settled that the principle announced in these cases is equally applicable to the Government—that is to say, the United States may set up against itself a statute of limitations in such language as to extinguish absolutely its right after the expiration of the period fixed. See *United States* v. *Chandler-Dunbar Company*, 209 U. S. 447; *Winona & St. Peter Railroad Company* v. *United States*, 165 U. S. 483; and *United States* v. *Jones*, 218 Fed. 973.

It is therefore immaterial that Section 612 of the Revenue Act of 1928 repealed Section 1106 (a) of the Revenue Act of 1926 as of the date of its enactment. It was merely declaratory of the pre-existing law and its

repeal was equally without significance. However, the validity of the attempt to repeal it retroactively has been denied. See *Wyman, Partridge & Co.* v. *United States* (Ct. of Cls.), 41 Fed. (2d) 886; *United States* v. *John Barth Co.*, 27 Fed. (2d) 782; *Dobbins* v. *Commissioner*, 31 Fed. (2d) 935; *Wettengel* v. *Robinson*, 289 Pa. 525; 136 Atl. 673. Furthermore, Section 906 (e) of the 1926 Act which provides that a finding by the Board of Tax Appeals that collection of any tax was barred by any statute of limitations should be considered as a decision that the taxpayer owed no tax, was just as effective as Section 1106 (a) and Section 906 (e) has not been repealed, but was re-confirmed by Section 601 of the 1928 Act.

POINT IV.

Section 611 of the Revenue Act of 1928, if construed as an attempt to deprive taxpayers of their vested rights in the completed bar of Section 250 (d) of the Revenue Act of 1921, is void under the Fifth Amendment to the United States Constitution.

Section 250 (d) of the Revenue Act of 1921 having operated to extinguish the taxpayer's liability for the tax in suit upon the expiration of five years from the filing of his return, a statute enacted by Congress after the bar of the statute had become complete, extending the period of limitation and in effect reviving the liability for the tax would be unconstitutional and void as a deprivation of property without due process of law under the Fifth Amendment to the United States Constitution. *William Danzer & Company* v. *Gulf & Ship Island Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company* v. *Cocke; Peninsula Produce Exchange* v. *New York P. & N. Railroad Company; United States* v. *John Barth Company, supra;*

Phillips v. *Grand Trunk Railway*, 236 U. S. 662; *Kansas City Southern Railway* v. *Wolf*, 261 U. S. 133. *Campbell* v. *Holt*, 115 U. S. 620 is distinguishable—it dealt with the ordinary statute which merely barred the remedy and did not extinguish the liability and therefore there was no vested right involved. See *Toxaway Mills* v. *United States; Wyman, Partridge & Co.* v. *United States; Wettengel* v. *Robinson; supra.*

In *Regla Coal Company* v. *Bowers*, 37 Fed. (2d) 373, the Court incorrectly described the taxpayer's right of recovery as being dependent on "sovereign grace" (see *supra*, pp. 11-12).

This distinction disposes of the Government's contention that Section 611 merely withdrew from the taxpayer a pre-existing remedy. We have shown, *supra*, that Section 611 should be construed as merely withdrawing one of the taxpayer's remedies, *viz.*, his right to a departmental refund of the tax. But the Government contends that the Section applies also to personal actions against the Collector, like the suit at bar, and thus deprives the taxpayer of every remedy. A statute which bars every remedy is not remedial, but goes to the substance. See *Wade on Retroactive Laws*, p. 241.

And that a right of action is as much within the protection of the constitutional prohibition as tangible property has been settled by this Court in *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338, where it was held that a State Legislature "cannot take away from a private party a right to recover money that is due when the Act is passed."

Since Section 611 did not reimpose the tax (see Point V, *infra*, p. 19), there was not at the time the money was exacted by the Collector, and is not now, any tax liability in existence. The tax was imposed by the

Revenue Act of 1916; all liability for the taxes imposed thereby, from and after the expiration of five years from the return date, was extinguished by the Revenue Act of 1921 and since that date the taxpayer has never been under any legal liability to pay the amount exacted from him. Upon the expiration of the period of limitation, the Collector became *functus officio* and his exaction of the amount from the taxpayer was a void act, not subject to ratification even by an express act of Congress. See *McCord* v. *Sullivan*, 85 Minn. 344.

POINT V.

Section 611 did not reimpose the tax in suit nor ratify the collection thereof.

United States v. *Heinszen & Company*, 206 U. S., 370 and *Rafferty* v. *Smith, Bell & Company*, 257 U. S. 226, are cited in support of the validity of Section 611 as a reimposition of the tax or a ratification of its collection. Those cases held that Congress had ratified the unauthorized collection of certain custom duties. Admitting that Congress had the power, the decisions were inescapable. In the *Heinszen* case the Act of Congress provided:

> "That the tariff duties * * *, are hereby legalized and ratified, and the collection of all such duties * * * is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

The ratifying Act in the *Smith, Bell & Company* case provided that:

> "The taxes imposed by the Philippine legislature * * * are legalized and ratified, and the collection of all such taxes made under or by authority

> of such Act * * * is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

In *Lincoln* v. *United States*, 202 U. S. 484, involving a similar question, the ratifying Act provided:

> "That the action of the President of the United States heretofore taken * * * as set forth in his order of July twelfth, eighteen hundred and ninety-eight, * * * together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved."

This Court said, p. 498:

> "The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order."

This Court said further, that:

> "This construction is favored by the consideration that the suits had been begun when the Act * * * was passed, and that, *even if Congress could deprive plaintiffs of their vested rights in process of being asserted,* * * * still *it is not to be presumed to do so on language which, literally taken, has a narrower sense.*
>
> "Moreover, the Act * * * was passed with full knowledge and after careful consideration of the decisions of this Court, and Congress was aware that grave doubt, at least, had been thrown upon its power to ratify a tax under circumstances like the present. *De Lima* v. *Bidwell*, 182 U. S. 1, 199, 200. This affords a special reason for believing that *if it had intended to encounter the limitations of that case it would have done so in clear words from which there was no escape.*

> "It should also be remembered that there was a powerful opposition in Congress and that the phraseology of the Act probably represents all that it was deemed safe to ask. *Every consideration requires that the ambiguous language of the Act should not be stretched beyond the exact and literal meaning of the words.*" (Italics supplied.)

Every consideration which induced this Court to adopt a strict construction of the statute in the *Lincoln* case, *supra*, is present in the case at bar. The case at bar and numerous similar cases had been begun when Section 611 was enacted with full knowledge by Congress of this Court's decision in *Bowers* v. *New York and Albany Lighterage Company*, *supra*, and the decisions of the Federal Courts construing the similar phraseology of Section 1106 (a) of the Revenue Act of 1926 as applying only to departmental refunds and not to actions against collectors (see *supra*, p. 11). In House of Representatives Report No. 2 (70th Congress, First Session), accompanying the Revenue Act of 1928, it was stated at page 34 that:

> "Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected."

The Committee stated further:

> "In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the Revenue Act."

But this provision to authorize the collection of outlawed taxes not theretofore collected was eliminated before the bill was enacted, due to objections raised during the course of its consideration in Congress. It is therefore safe to assume that the phraseology of Section 611 as enacted "represents all that it was deemed safe to

ask". The language of this section, taken literally, certainly does not reimpose the income tax for the year 1917, nor does it extend the time within which such taxes might be collected, nor does it ratify or validate the action of the various collectors who had illegally exacted such taxes.

In the *Lincoln* case, *supra*, this Court pointed out, at page 499, that:

> "It would be inadmissible to lay down as a general rule that a particular ratification covered what was not, in the judgment of the courts, included or intended to be, simply because it might be thought to have been otherwise unnecessary."

POINT VI.

Section 611, if construed as reimposing the tax in suit or ratifying its collection, is void under the Fifth Amendment.

However, even if it should be considered that the intent of Congress was plain to reimpose the tax or ratify its collection, the statute is nevertheless unconstitutional in that it is discriminatory, arbitrary and unjust to such an extent as to constitute the taking of property without due process of law.

We have pointed out above that the statute did not authorize the collection of any taxes. In *Regla Coal Company* v. *Bowers*, *supra*, the District Court for the Southern District of New York indicated that it considered that the portion of the section which refers to taxes collected within one year after its enactment authorizes such collections to be made. In any event, the court stated that such collections could not be enjoined and that if the taxes were once collected, they could not

be recovered because of Section 611. The court added that the fact that some taxpayers might escape because the collector did not act within the one year period "is beside the point" and that "it must be assumed that the executive department of the government will act with due diligence".

Prior to the decision of this Court in *Bowers* v. *New York & Albany Lighterage Company, supra,* handed down on February 21, 1927, the Treasury Department did, after the expiration of the five-year period, collect taxes which had been assessed within the five-year period but this was due to the Department's mistaken interpretation of the limitation provision. After this Court's decision in the *New York & Albany Lighterage* case, the Department ceased collecting such outlawed taxes and it has not resumed the practice even after the enactment of Section 611, but has instructed Collectors that Section 611 gave them no right to collect. See, *supra,* p. 11; also *Mimeograph No. 3660* issued by the Commissioner of Internal Revenue, Int. Rev. Cum. Bull., Vol. VII-2, p. 82; *General Counsel's Memorandum No. 4197, Id.,* p. 87; *Wettengel* v. *Robinson, supra.*

Furthermore, if the case fell otherwise within the provisions of Section 611, but if, when the taxpayer's abatement claim was decided, the taxpayer did not pay the tax under protest and sue for a refund, but appealed his case to the Board of Tax Appeals, he escaped liability for the tax because under the provision of Section 906 (e) of the Revenue Act of 1926 or of Section 601 of the 1928 Act, if the Board found that collection of the tax was barred by limitations, its finding was considered to be a decision that no tax was owing. See *Philadelphia Lawn Mower Co.* v. *Commissioner,* 16 B. T. A. 435, being one of several cases where such a decision was rendered after the enactment of Section 611.

If when the tax was assessed against the taxpayer, he did not file an abatement claim, but filed a claim for credit—that is to say, if he did not deny the correctness of the assessment but merely claimed that he had overpaid some other tax which should, therefore, be credited against the assessment admittedly owed by him, and if such claim for credit remained under consideration in the Treasury Department until after the five-year period of limitations had expired and until after this Court's decision in the *New York & Albany Lighterage* case, *supra*, the Treasury Department, if it then decided that the taxpayer had not overpaid the other tax, nevertheless did not collect the assessment and had no authority to collect it. If the Department decided that the taxpayer had overpaid the other tax, it nevertheless did not credit such overpayment against the outlawed assessment, for that would have amounted to a collection of the outlawed assessment, but it refunded the overpayment to the taxpayer, who thus in either event escaped the payment of the additional assessment against which he had filed the claim. This was also in accordance with the ruling of the General Counsel of the Bureau of Internal Revenue. See: *General Counsel's Memorandum No. 6296*, Int. Rev. Cum. Bull., Vol. VIII-2, p. 152.

Considered as a reimposition of the tax or a ratification of its collection, Section 611 is therefore void because it is arbitrary. It did not provide for the collection of the tax from all persons originally liable therefor, but at the most it merely reimposed the liability upon a certain limited class of taxpayers, arbitrarily selected without any sound basis for a distinction.

There was not even a sound basis for distinction between taxpayers who filed and those who did not file abatement claims. The Treasury Department had two regular methods of assessing and collecting additional

income taxes: The Department either notified the taxpayer of its intention to assess a further tax and gave him an opportunity to file a protest and to have hearings thereon, or the Department assessed the tax without any prior notice or consideration of the merits and then notified the taxpayer and permitted him to file an abatement claim. If the taxpayer was notified and given an opportunity to protest before the assessment, an abatement claim was not entertained (*Sec. 250 (d), Rev. Act of 1921; Articles 1006* and *1012* of *Regulations 62*). And where abatement claims were filed the Collector was not authorized to delay collection of the tax pending consideration of the claim, where such delay would jeopardize collection. The filing of the claim did not toll the statute (*General Counsel's Memorandum No. 2757*, Int. Rev. Cum. Bull., Vol. VII-2, p. 302) and *Article 1032* of *Regulations 45* (promulgated under the 1918 Act) and *Article 1032* of *Regulations 62* (promulgated under the 1921 Act) specifically provided that:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of a tax, or make it any the less the duty of the Collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

Article 261 of *Regulations 33* (promulgated under the 1916 Act) was substantially identical. That the imminent expiration of the statute of limitations constituted "jeopardy", see *I. T. 1333*, Int. Rev. Cum. Bull., Vol. I-1, p. 305 and *Veeder* v. *Commissioner*, 36 Fed. (2d) 342, construing the similar language of the proviso at the end of Sec. 250 (d) of the Revenue Act of 1921.

The proceedings on the protest prior to assessment, or the proceedings on the abatement claim after assessment were merely a part of the departmental procedure in *determining and assessing* the tax. It was the Department's duty under Section 250 (d) of the Revenue Act of 1921 to *determine, assess and commence proceedings to collect* the tax, all within the five year period, and the taxpayer was entitled to a hearing either before or after assessment, unless the granting of a hearing would jeopardize collection of the tax. If the Department chose to assess first and then determine, there is no good reason for placing the taxpayer in a worse position than if the Department had chosen first to determine and then assess, yet Section 611 is not claimed to cover a case where both assessment and collection of the tax were stayed on a protest pending the determination of the amount to be assessed and collected. See: *General Counsel's Memorandum No. 6308*, Int. Rev. Cum. Bull., Vol. VIII-1, p. 132.

In *Gulf, Colorado & Santa Fé Ry. Co.* v. *Ellis*, 165 U. S. 150, this court said at page 159 that "arbitrary selection can never be justified by calling it classification". See, also, *Schlesinger* v. *Wisconsin*, 270 U. S. 230; and *Frew* v. *Bowers*, 12 Fed. (2d) 625, cited with approval by this Court in *Nichols* v. *Coolidge*, 274 U. S. 531.

The test as to whether a reimposition or ratification of a tax is valid must, under the doctrine announced by this Court in *Forbes Boat Line* v. *Board of Commissioners, supra*, depend upon whether "if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power," and, under the doctrine announced in *Charlotte Harbor Railway* v. *Welles*, 260 U. S. 8, whether the Legislature can authorize the act *at the time it ratifies it*. Consequently, in order to support Section 611 as a

reimposition or ratification of the tax, this Court must decide that Congress could have imposed a tax in 1928 for the calendar year 1917 upon the arbitrary basis therein attempted.

Even so, it must not be overlooked that the fact that a classification is made retroactively may alone demonstrate that such classification is arbitrary. This was decided, in effect, in *Forster* v. *Forster*, 129 Mass. 559, where the Court declared unconstitutional a very similar statute which attempted to validate certain tax sales but excepted certain cases from its operation, basing the distinction "upon the questions, whether a suit to recover it has or has not been already commenced; whether the person who owned it at the time of the sale for taxes, * * * has kept his land, or has parted with it; and whether his grantee succeeded to his title before or since" a prior decision of the Massachusetts Court.

Chief Justice Gray, later an Associate Justice of this Court, writing the opinion, said at page 561 that:

> "While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for the support of the government, yet the validity of proceedings taking his land against his will in discharge of his tax depends upon no considerations of equity, but upon a strict compliance, on the part of the municipal officers, with the regulations *previously prescribed* by statute for the double purpose of securing the payment of the tax and of protecting the citizen against unnecessary sacrifice of his property." Citing *Williams* v. *Peyton*, 4 Wheaton 77. (Italics supplied.)

The Court said p. 562:

> "We find it impossible to reconcile this statute with the fundamental principles, declared in the Constitution of the Commonwealth, that every subject has the right to be protected in the enjoyment of his property according to standing laws; that

his property shall not be appropriated, even to public uses, without paying him a reasonable compensation therefor; that he shall not be deprived of his property or estate, but by the judgment of his peers or the law of the land; and that the legislative department shall never exercise the judicial power."

We submit that there is not as much basis for the classification claimed to have been made by Congress in Section 611 as for the classification attempted in the above case. See also, *Cummings* v. *Missouri*, 4 Wall. 277, 319, 320, 325, and *Ex Parte Garland, Id.*, 333, dealing with *ex post facto* laws.

Respectfully submitted,

CARL TAYLOR,
ROLLIN BROWNE,
Amici Curiae.

TAYLOR, BLANC, CAPRON & MARSH,
CARTER T. LOUTHAN,
Of Counsel.

New York, September 23, 1930.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

NO. 36.

R. E. GRAHAM and E. E. FOSTER, Co-partners, Doing Business Under the Firm Name of MILLIE FRANCIS OIL COMPANY, a Co-partnership, Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America in and for the Sixth Collection District, State of California.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

MAYNARD TEALL,
WILLIAM WALLACE BOOTH,
WILLIAM A. SEIFERT,
Counsel for American Refractories Company, Clinton Iron & Steel Company, Diamond Alkali Company, Spear & Company, and Bessemer Coal & Coke Corporation, as Amici Curiae,
147 Union Trust Building,
Pittsburgh, Pa.

EUGENE E. STRASBURGER,
Of Counsel, for Spear & Company

SMITH BROS. CO., INC., LAW PRINTERS, 322-324 GRANT STREET, PITTSBURGH, PA.

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REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America in and for the Sixth Collection District, State of California.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May it Please the Court:

The undersigned, as counsel for American Refractories Company, Clinton Iron & Steel Company, Diamond Alkali Company, Spear & Company, and Bessemer Coal & Coke Corporation, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

MAYNARD TEALL,
WILLIAM WALLACE BOOTH,
WILLIAM A. SEIFERT,
Counsel for American Refractories Company, Clinton Iron & Steel Company, Diamond Alkali Company, Spear & Company, and Bessemer Coal & Coke Corporation, as Amici Curiae.

EUGENE B. STRASSBURGER,
Of Counsel for Spear & Company.

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BRIEF OF AMICI CURIAE.

I.

PRELIMINARY STATEMENT.

(a) Reason for Brief.

The reason for the motion for leave to file this brief is that the writers are counsel for American Refractories Company, Clinton Iron & Steel Company, Diamond Alkali Company, Spear & Company, and Bessemer Coal & Coke Corporation, each of which corporations is plaintiff in a case involving the construction and constitutionality of Section 611 of the Revenue Act of 1928 and now pending in either the United States District Court for the Western District of Pennsylvania or the United States Circuit Court of Appeals for the Third Circuit.

(b) The Writers' Position.

We understand the Government's position to be that Section 611 means that if an assessment of tax was made prior to June 2, 1924, and a claim in abatement was thereupon filed and collection "stayed", the tax so assessed, if collected prior to enactment of the Revenue Act of 1928 or within one year after such enactment, cannot be recovered by the taxpayer, under *Bowers v. New York & Albany Lighterage Company*, 273 U. S. 346, notwithstanding that when the collection was enforced the period of time within which that might lawfully have been done had expired and the collection was then unlawful; and that Section 611 as so construed is constitutional and valid.

In contrast to that, our position is that Section 611 was not intended either to create or destroy substantive rights or to affect the suit of any taxpayer to recover any tax collected from him too late, and therefore unlawfully, but is only an administrative provision intended to control the Commissioner of Internal Revenue in granting claims, filed in his office, for refund or credit in a limited class of cases; that, as so construed, the section is constitutional; and that the section, construed as the Government construes it, is unconstitutional and void.

Adopting without discussion the Government's construction of Section 611, the court below decided this case on the meaning of the word "stay" (R. 31). If that construction is wrong, or if Section 611 as construed by the Government is unconstitutional, the court below is wrong—even though that court may have given the correct meaning to "stay".

The issue in this case, therefore, is not so narrow as the meaning of "stay". Before that question is

reached, the construction and constitutionality of Section 611 as a whole must be considered, and it is to that—more fundamental, we believe—aspect of the case that this brief is primarily directed.

II.

STATEMENT OF FACTS.

In January, 1920, after the plaintiffs, on March 22, 1918, had filed their 1917 return and subsequently paid the tax shown therein to be owing, the Commissioner of Internal Revenue assessed against them additional income and profits taxes for 1917 in the sum of $7,034.71 (R. 11-12). On February 11, 1920, plaintiffs filed claim for abatement thereof, which was rejected December 27, 1922 (R. 12). The additional tax and interest thereon amounted in the aggregate to $9,039.40, which the defendant collected, $2,039.40 on November 29, 1924, and $7,000.00 on December 3, 1924, plaintiffs making the payments under duress and protest (R. 12). Plaintiffs duly filed claim for refund, alleging that the collection was enforced too late and, on rejection of their claim, instituted this action for recovery of the money (R. 12-13).

The return was not false or fraudulent. There was never any agreement or so-called waiver extending the time for assessment or collection (R. 13). The collection was therefore unlawful and a taking of plaintiffs' property without any right in the defendant to do so, for the period for collection of 1917 income and profits taxes was—and still is—five years after filing of the return, and the time for collecting the tax here in issue expired, therefore, on March 22, 1923; Section 250 (d) of the Revenue Acts of 1918 and 1921; Section 277 (a) (2) of the Revenue Act of 1924; Section 277 (a) (3) of the Revenue Act of 1926. Even the

Revenue Act of 1928 itself left the so-called period of limitation on assessment and collection of 1917 taxes, to wit, five years, as it was under the prior acts, for it contained no amendment of the sections just cited (Section 275) and provided that (Section 1) "income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title"—Income Tax—"but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act."

The collection made late in 1924 was unlawful then and if made now would be in violation of the so-called statute of limitations. The rule of *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346, would apply. At that point, however, the Collector directs attention to the fact that a claim for abatement was filed, contends that on that account collection was "stayed", and relies upon Section 611 of the Revenue Act of 1928, enacted May 19, 1928, almost four years after the unlawful collection, as express and valid statutory authority depriving the plaintiffs of their previous cause of action against him and permitting him—or the Government—to retain the money unlawfully collected. This brings us to the question in the case.

III.

STATUTES.

Revenue Act of 1928, TITLE I—INCOME TAX.

SUBTITLE A—INTRODUCTORY PROVISIONS.

Sec. 1. APPLICATION OF TITLE

"The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act."

SUBTITLE C—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT O—OVERPAYMENTS.

Sec. 322. REFUNDS AND CREDITS.

"(a) AUTHORIZATION.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"(b) LIMITATION ON ALLOWANCE—

(1) "Period of Limitation.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, un-

less before the expiration of such period a claim therefor is filed by the taxpayer.

(2) "Limit on Amount of Credit or Refund.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund."

Revenue Act of 1928, TITLE IV—ADMINISTRATIVE PROVISIONS:

"Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. COLLECTION STAYED BY CLAIM IN ABATEMENT.

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of

the period of limitation on assessment and collection."

"Sec. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT.

"Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

IV.

SUMMARY OF ARGUMENT.

Resort to reports of legislative committees is not to be countenanced if the statute in question is unambiguous. In no event can an intent not expressed in the statute be given force or effect. If ambiguous, the statute, being a taxing statute, is to be construed liberally in favor of the taxpayer.

Statutes are to be construed as prospective unless a clear intent appears to the contrary, and they are to be construed so as to avoid any question of their constitutionality.

Statutes of limitation promote repose and are favored in society.

A tax is not a debt in the ordinary meaning of that term and no action lies for its recovery unless provided by statute. Therefore, there is no liability to pay a tax after its collection is barred by the statute creating the tax.

Section 611 of the Revenue Act of 1928 does not affect substantive rights, but is a mere administrative provision governing the Commissioner in the matter of allowing credits or paying claims for refund. The section is not retroactive, but is wholly prospective in terms, purpose, and intent.

Section 612 of the Revenue Act of 1928 was adopted for the purpose of fully effectuating the change in administrative provisions made by Section 607 and of eliminating any possible conflict between the administrative rule in that section and the administrative rule in Section 1106 (a) of the Revenue Act of 1926.

Neither Section 607 nor 611 nor 612 is a statute of limitations, or an amendment thereof, or a withdrawal of the Government's consent to be sued, or a modification of such consent, or a withdrawal or modification of any judicial remedy.

If Section 611 be so construed as to prevent a taxpayer from recovering a debt existing and fully vested prior to enactment of the Revenue Act of 1928 it violates the Fifth Amendment.

The fact that the tax in question was collected prior to the passage of the Act of 1926 should have no bearing on the construction of an administrative provision of a taxing statute. Whether it be held that the sections of the Revenue Act in question be administrative or not, the answer in this case should not be predicated upon whether the liability had been extinguished when the tax was paid, but whether it was extinguished when the Revenue Act of 1928 was passed.

Even if Section 611 be held to be constitutional, retroactive, and not an administrative provision, it is not applicable to this case, as the word "stay" denotes more than a voluntary delay.

V.

ARGUMENT.

Introduction.

This brief is confined to questions of constitutionality and construction of Sections 611 and 612 of the Revenue Act of 1928 and to the meaning of the word "stay" as used in Section 611.

The fact that the tax in issue was collected after the bar of the statute of limitations is admitted. Immediately upon the collection thereof a debt arose in favor of the taxpayer and against the collector. Thereafter the Revenue Act of 1926 was passed and extinguished any liability, if it ever existed, on the part of the taxpayer to pay the alleged tax.

If that debt be not now owing and recoverable by suit the only reason is Section 611 of the Revenue Act of 1928, adopted three and a half years after the debt arose.

The issue, then, is whether Section 611 of that Act extinguishes a previously existing debt or precludes suit upon that debt, and if it does, whether it is in contravention of the Fifth Amendment.

As preliminary to our main points or argument, we draw attention to the following principles:

(1) The intent of the legislative body which enacted a statute is to be determined first by the language used; if that be unambiguous, there is no occasion to resort to the reports of legislative committees or other parol matters: *St. Louis, Iron Mountain & S. R. Co. v. Craft*, 237 U. S. 648;

(2) In no event may an intent not expressed in the statute as written and adopted be given force or effect; the intent of the legislature is law only so far as expressed in the statute; *id.;*

(3) Statutes, especially taxing statutes, will be construed as only prospective unless the language clearly shows that a retrospective effect was intended: *Union Pacific R. Co. v. Laramie Stock Yards Co.,* 231 U. S. 190, 199, 58 L. Ed. 179; *United States v. Magnolia Petroleum Co.,* 276 U. S. 160; *Russell v. United States,* 278 U. S. 181;

(4) Statutes will be so construed, if reasonably possible, as to avoid question of their constitutionality: *Lewellyn v. Frick,* 268 U. S. 238;

(5) Statutes of limitations promote repose, are vital to the welfare of society and are favored in the law. In *Wood v. Carpenter,* 101 U. S. 135, the court said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary."

(6) The doctrine that taxing statutes are to be construed most strongly in favor of the taxpayer and against the Government, announced in *Gould v. Gould,* 245 U. S. 151, and followed in a long line of cases, has been recognized and affirmed in statute of limitations cases, the Government contending to the contrary in the late cases of *Bowers v. New*

York & Albany Lighterage Company, Russell v. United States, supra, and *United States v. Updike,* 281 U. S. 489;

(7) The general principle that a statute of limitations as a rule bars the remedy but does not extinguish the liability and that a moral obligation after the bar becomes effective is sufficient consideration for a new acknowledgment or a promise to pay the outlawed debt are recognized. But such principle should relate only to actual debts in existence and not to taxes, as a tax is not a debt in the ordinary sense of the word. In *37 Cyc.* 710, it is said:

> "As the obligation to pay taxes does not rest upon any contract express or implied, or upon the consent of the taxpayer, a tax is not a debt in the ordinary sense of that word; and for the same reason taxes are not assignable as ordinary debts, unless it is expressly so provided, nor are they the subject of setoff between the taxpayer and the state or municipality, nor do they draw interest like ordinary obligations, save where the statute so declares."

It is true that a tax has been classified as a debt within the meaning of R. S. Section 3466, establishing the priority of debts due from insolvents to the United States: *Price v. United States,* 269 U. S. 492. But that case lays down no proposition in any way analogous to the proposition here asserted by the Government that in so far as the statute of limitations affects the right to collect a tax, such tax is to be considered as an ordinary debt and the statute may be changed by will of the legislature, there being no vested right accruing under an ordinary statute of limitations as applied to ordinary debts.

In 37 *Cyc.* 1240 it is said:

"As a tax is not a debt in the ordinary meaning of that word, it is generally held that action will lie for its recovery, that is, that a suit at law cannot be maintained against the taxpayer unless a statute authorizes such an action."

Therefore, after the time within which suit may be instituted to recover a tax or within which a tax could lawfully be collected has expired, there is no liability to pay the tax and that liability cannot be recreated by a subsequent act: *Eberhart v. United States,* 204 Fed. 884 at 890; *Wm. Danzer & Co. v. Gulf & Ship Island R. Co.,* 268 U. S. 633, 69 L. Ed. 1126; *Wettengel v. Robinson,* 300 Pa. 355, 365. The creation of the right to sue or collect must be given in the act creating the tax and fixing the limitation period.

A.

SECTION 611 OF THE REVENUE ACT OF 1928 DOES NOT AFFECT SUBSTANTIVE RIGHTS, BUT IS A MERE ADMINISTRATIVE PROVISION GOVERNING THE COMMISSIONER IN THE MATTER OF ALLOWING CREDITS OR PAYING CLAIMS FOR REFUND; MOREOVER, THE SECTION IS WHOLLY PROSPECTIVE IN TERMS, PURPOSE AND INTENT.

Sec. 611 is an exception to or qualification of Sec. 607; its meaning cannot be ascertained unless Sec. 607 be considered.

Sec. 607 contains but one sentence. The subject is "any tax", which is made to include interest, etc. and taxes paid either before or after enactment of the statute. The predicate is "*shall* be considered * * * and *shall* be credited or refunded". Although Sec. 607 applies as well to taxes previously assessed as to taxes to

be assessed in future, what is to be done about them, under the provisions of the section, is to be done in the future.

The same is true of Sec. 611. The predicate is "*shall not* be considered". Then is added "*under the provisions of section 607*", showing that the purpose of Sec. 611 is to take out of Sec. 607 a situation that would otherwise be within it.

If the sections merely define "overpayment", the definition is for the future and not for the past. They appear to go farther than that, however, and to impose a rule of action upon somebody—always for the future.

The Collector says the rule is imposed upon the world at large, including the courts. The writer hereof submits that the rule is imposed upon the Commissioner and the Commissioner only, has reference to his action in the future, and deals with a matter of internal administration of the Bureau of Internal Revenue with which courts and litigants are not concerned.

That neither section is addressed to the courts or intended to affect the action or the judgment of any court in any litigated case is obvious. Sec. 607 provides that under certain circumstances the tax "shall be considered an *overpayment* and shall be *credited* or *refunded* to the taxpayer *if claim therefor is filed* within the period of limitation * * *." Sec. 611 provides that under certain other circumstances the payment "shall not be considered as an overpayment *under the provisions of section 607* * * *." No court either refunds a tax or orders anybody else to refund it; judicial procedure in a tax case is to render judgment for the plaintiff against the defendant, or *vice versa*, as in any other action at law. Nor is there any

judicial process by which an overpayment of tax may be "credited * * * to the taxpayer". Claims for refund are not filed in court.

There is but one person authorized to make refund of or allow credit for an overpayment of taxes or with whom a taxpayer may file a claim for refund or credit. That person is the Commissioner. R. S. 3220 authorizes the Commissioner to "remit, refund, and pay back all taxes erroneously or illegally assessed or collected" and R. S. 3226 provides that suit shall not be maintained for recovery of a tax erroneously or illegally assessed or collected "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue * * *." (R. S. Sec. 3226; Acts Nov. 23, 1921, c. 136, sec. 1318, 42 Stat. 315; June 2, 1924, c. 234, sec. 1014, 43 Stat. 343; Feb. 26, 1926, c. 27, sec. 1113, 44 Stat. 9). Plainly, therefore, Secs. 607 and 611 refer to action of the Commissioner, directing him to allow refund or credit in one set of circumstances and not to allow it in another set of circumstances.

Legislative history confirms that construction. The *Revenue Act of 1926* was in force when the *Revenue Act of 1928* was adopted.

Section 1111 of the Revenue Act of 1926 amending R. S. 3220 authorized the Commissioner to refund all taxes erroneously or illegally assessed or collected, all penalties collected without authority, etc.; also, to repay to any Collector or Deputy Collector the full amount of such sums of money as may be recovered against him in any court for any internal revenue taxes collected by him, with the costs and expenses of suit, etc., except as provided in Sections 284 and 319.

Section 284 provided that repayment should be made only in cases of "overpayment", and Section 319 authorized a refund of estate taxes only—pursuant to

decision of the Board of Tax Appeals. The former authorized a voluntary refund, the latter authorized a refund by order of another department of the executive branch of the Government. Under the latter, refunds in statute of limitations cases could be made.

Section 1106 (a) prohibited refunds by the Commissioner except in cases where the taxpayer had overpaid the tax. This section has been held to be administrative, controlling the action of the Commissioner in making voluntary refunds and having no bearing in an action against the Collector recovery from whom depends upon other applicable statutes: *Thornhill Wagon Company v. Noel,* 17 F. (2d) 407; *Gove v. Nichols,* 23 F. (2d) 856; *Ellay Company v. Bowers,* 25 F. (2d) 637, certiorari denied, 48 S. Ct. 601.

In the *Thornhill Wagon Company* case the court held:

> "The conclusion reached by me as to this position is that section 1106 (a) is not susceptible of this construction. It does indeed provide that no refund shall be made except for overpayment, but this unquestionably was intended to apply to voluntary refunds by the Commissioner and to control the action of the executive departments in such respects. If the tax demanded, and to collect which the distraint was issued, is hereafter paid, and an action at law is begun for its recovery, such action will be against the collector, individually, and not against the United States (*Sage v. United States,* 250 U. S. 33, 37, 39 S. Ct. 415, 63 L. Ed. 828), and the repayment, if recovery is had, will depend upon other applicable statutes."

If the Government's present contention be correct, why was not the theory advanced that Section 1106 (a)

of the Revenue Act of 1926 barred recovery of *any* tax after the bar of the statute of limitations except in cases where the taxpayer had actually overpaid the tax? The same reasoning supports both theories. The courts, as hereinbefore stated, have held that that section is administrative and only bars the Commissioner from making a voluntary refund in statute of limitations cases unless the tax has been overpaid, and does not defeat a taxpayer's right to recovery by suit.

For two years prior to the adoption of the Revenue Act of 1928, therefore, the law was that the Commissioner could make refund only in case of "overpayment", i. e., where the tax was excessive in *amount*. Where the contention was illegality of assessment or collection, as in a statute of limitations case, the Commissioner could not make a refund and, no matter how clear the case, the taxpayer was obliged to sue the Collector in the courts. That limitation on the Commissioner's authority was not unnatural. He is a fiscal officer, not a law officer, and a Congress willing for him to decide questions of fact and figures might well be unwilling, and as shown by the *Revenue Act of 1926* was unwilling, for him to decide certain purely legal questions. By 1928, however, the law of the statute of limitations had been considered and most questions (except the new ones raised by the *Revenue Act of 1928* itself) decided in numerous litigated cases, wherefore Congress was willing to confer upon the Commissioner authority, taken away from him in 1926, to make a refund or allow a credit where the error or illegality was not in determination of the *amount* of the tax but in the fact that assessment or collection had been made after expiration of the period of limitation. Accordingly, the Commissioner being authorized by Sec. 322 of the 1928 Act to make refund or

allow credit in case of "overpayment", Congress, by Sec. 607, extended the definition of "overpayment" to include "any tax * * * assessed or paid * * * after the expiration of the period of limitation properly applicable thereto." Cases in which the assessment had been made several years before and claims in abatement had been filed were, however, a special class in which, as subsequent litigation has shown, somewhat difficult questions of law were presented. In that particular class of cases, Congress was not willing to leave the decision to the Commissioner. Accordingly, by Sec. 611, Congress provided that where the assessment was prior to June 2, 1924 and claim in abatement was filed and collection stayed, the payment when made should not "be considered as an overpayment *under the provisions of section 607,* relating to payments made after the expiration of the period of limitation on assessment or collection," and in that case left the taxpayer to his remedy in court as before.

Secs. 607 and 611 are supplemental to Sec. 322, which authorizes the Commissioner to allow refund or credit in case of "overpayment", and, when read in connection with that section, are clearly perceived to have reference to one matter only, to-wit, the authority of the Commissioner to allow refund or credit on filing with him of a claim therefor.

The foregoing construction is further confirmed by the fact that Secs. 607 and 611 appear in the Act under "TITLE IV — ADMINISTRATIVE PROVISIONS". Section 1106 (a) of the Revenue Act of 1926 appeared under a similar title and was, as we have hereinbefore shown, uncontrovertedly held to be administrative only. Administrative provisions of a statute are addressed to the officer or body who is to administer the statute.

Neither substantive rights nor judicial remedies would be placed under that heading.

Sec. 611 does not provide generally that payment under the circumstances stated therein shall be deemed to have been lawful and proper, but only that it shall not be considered an overpayment *"under the provisions of section 607."* In other words, the enlargement of the definition of "overpayment" is not extended to the case referred to in Sec. 611; as to that case, the Commissioner remains without authority, and the taxpayer must bring suit against the Collector—as he was required to do in *every* statute of limitations case under the 1926 Act.

Nothing retrospective is expressed or even implied in either section. Sec. 607 confers on the Commissioner an authority he had not possessed since 1926, and Sec. 611 excepts one special situation from the authority thus conferred.

The construction above submitted is not only reasonable and, indeed, almost unavoidable when the legislative history is considered, but conforms to the rule that provisions of a tax law shall not be construed as retrospective unless clearly so intended and also to the rule that a statute should, whenever reasonably possible, be so construed as to avoid constitutional questions.

B.

SECTION 612 OF THE REVENUE ACT OF 1928 WAS ADOPTED FOR THE PURPOSE OF FULLY EFFECTUATING THE CHANGE IN ADMINISTRATIVE PROVISIONS MADE BY SECTION 607 AND OF ELIMINATING ANY POSSIBLE CONFLICT BETWEEN THE ADMINISTRATIVE RULE IN THAT SECTION AND THE ADMINISTRATIVE RULE IN SECTION 1106 (a) OF THE REVENUE ACT OF 1926.

Sec. 1 of "TITLE I—INCOME TAX" of the *Revenue Act of 1928* is:

> "The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act."

The *Revenue Act of 1928* is unlike the Acts of 1918, 1921, 1924 and 1926 in that it is not what may be called an omnibus act; it allows the provisions of the last preceding act to stand except as changed, added to, or subtracted from by the 1928 Act itself. Accordingly, unless change were made in Sec. 1106 (a) of the Act of 1926, the provisions thereof would stand. One of those provisions was that "no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax * * *." That provision had been changed, except in the special case referred to in Sec. 611, by Sec. 607 of the 1928 Act, and, accordingly, Sec. 1106 (a) of the Act of 1926 was repealed.

Congress might have reached the same result that it did reach if it had merely amended Sec. 1106 (a) by adding thereto, as a proviso, the enlarged definition of "overpayment" contained in Secs. 607 and 611 of the 1928 Act. It chose instead to add 607 and 611 as new sections and repeal Sec. 1106 (a) of the 1926 Act entirely.

Sec. 612 is also under "TITLE IV—ADMINISTRATIVE PROVISIONS."

What the specific reason was for making the repeal of Sec. 1106 (a) date back to enactment of the section is a matter of conjecture. A possible explanation is that there was always doubt and confusion as to the meaning of Sec. 1106 (a) and that the Commissioner himself may have so far misunderstood it as to have made some refunds in statute of limitations cases though not authorized to do so. Repeal of Sec. 1106 (a) as of the date of its enactment would legalize such refunds and retroactively give the Commissioner authority to do the same thing between 1926 and 1928 that Sec. 607 of the Act of 1928 authorized him to do from 1928 onwards.

Furthermore, Section 612 does not clearly manifest an intention to re-open cases like the present or cases where the tax was collected after the passage of the Act of 1926, either as to collection of the tax or as to recovery of an illegally collected tax. On the contrary, the expressed reason, appearing in the report of both the Senate and the House proposing the Revenue Act of 1928, was because—

> "Section 1106 (a) of the 1926 Act (26 U. S. C. A. § 1249 note) failed to resolve many doubtful questions as to the legal effect which follows the

> expiration of the period of limitations prescribed for the assessment or collection of a tax, or for the making of a refund or credit, or the bringing of a suit for refund." (See House Report No. 2, p. 33 and Senate Report No. 960, p. 41, both 70th Congress, 1st Session).

In the words of the Supreme Court of Pennsylvania:

> "The utmost effect which can be given to that reason, and it is the only one of which we have been advised, is that, when making settlements in the future, the government shall not be hampered by the 'doubtful questions' which bothered it in the past." *Wettengel v. Robinson,* 300 Pa. 355, 368.

The Government will hardly contend that the purpose was to revive a liability expressly "extinguished" by Sec. 1106 (a) two years before; for Congress is without power to re-create a liability previously extinguished: *Danzer & Co. v. Gulf & Ship Island R. R. Co.,* 268 U. S. 633, and to same effect specifically with regard to this particular statute, see, *Dobbins v. Commissioner,* 31 F. (2d) 935, (C. C. A. 3rd C.); *United States v. John Barth Co.,* 27 F. (2d) 782, (C. C. A. 7th C.), reversed by this court on other grounds in 279 U. S. 370, 73 L. Ed. 743; *Erie Coal & Coke Co. v. Heiner,* 33 F. (2d) 135, affirmed in 42 F. (2d) 214; *Pepsin Syrup Co. v. Schwaner,* 35 F. (2d) 197; and *Wettengel v. Robinson,* 300 Pa. 355, 366.

C.

NEITHER SECTION 607 NOR 611 NOR 612 IS A STATUTE OF LIMITATIONS OR AMENDMENT THEREOF, OR A WITHDRAWAL OF THE GOVERNMENT'S CONSENT TO BE SUED OR MODIFICATION OF SUCH CONSENT, OR A WITHDRAWAL OR MODIFICATION OF ANY JUDICIAL REMEDY.

A taxpayer does not derive either his cause of action or his remedy of suit from Sec. 607, hence Sec. 611, providing for an exception to Sec. 607, does not affect either his cause of action or his remedy.

Previous acts did not contain the provisions of Sec. 607 or any similar provisions. Yet long prior to 1928 taxpayers had and successfully prosecuted causes of action when a collector enforced payment of taxes after expiration of the statutory period: *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346. Those causes arose by virtue of the applicable *statute of limitations, contained in Sec. 250 (d) of the Acts of 1918 and 1921 and Sec. 277 of the Acts of 1924 and 1926.* Sec. 607 is not the statute of limitations even under the Act of 1928 itself; the section on that subject is Sec. 275, under an entirely different title, to-wit, "TITLE I—INCOME TAX". These statutes of limitations are not repealed or amended or even referred to in Sec. 607 or 611 or 612, and causes of action will continue to arise under one or more of them in the future as in the past. This particular taxpayer's cause of action arose under Sections 250 (d) of the Revenue Acts of 1918 and 1921; Sections 277 of the Revenue Acts of 1924 and 1926. *Those are law today, unaffected by Sec. 607 or Sec. 611 or any other section of the Act of 1928.*

Since no cause of action arose or can arise under Sec. 607, but must arise if at all under entirely differ-

ent sections or statutes, Sec. 611, creating an exception to Sec. 607, does not destroy, withdraw, or qualify any cause of action.

Even the right to sue—the judicial remedy—is not derived from Sec. 607, hence is not conditioned or otherwise affected by Sec. 611. This action and others like it were brought under *R. S. 3226,* authorizing suit against a collector after rejection by the Commissioner of a claim for refund, and not under the provisions of any of the revenue acts except insofar as R. S. 3226 has been expressly amended by such acts. In point of fact, R. S. 3226 was specifically amended by Sec. 1318 of the Act of 1921, Sec. 1014 of the Act of 1924, and Sec. 1113 of the Act of 1926. R. S. 3226 is not even mentioned in Sec. 607 or 611 or 612 of the Act of 1928 and obviously is not amended by any of them.

It cannot be too strongly emphasized that since neither the cause of action nor the judicial remedy is derived from Sec. 607, neither the one nor the other is affected by Sec. 611. Sec. 611 must, therefore, be an administrative provision.

Without completely analyzing Secs. 607 and 611 to ascertain their real purpose and intent, those taking the other side of the question under discussion *assume* that the purpose and intent of Sec. 611 were to prevent a taxpayer from recovering a debt owed to him before Sec. 611 was adopted, and then proceed to argue that the section is constitutional. Tacitly admitting that a pre-existing debt may not be destroyed by legislative fiat and that Congress is without power to revive a previously extinguished liability, they argue thus: (1) The sovereign may not be sued save by its own consent; (2) Giving such consent, the

sovereign may condition it in such manner as may be desired or may even withdraw it altogether; (3) That is what the United States has done by Sec. 611; (4) Sec. 611 is therefore constitutional.

(1) and (2) are admitted. We might even admit (4) if (3) were true. But (3) is not true.

In the first place, in this type of case the Government is not sued at all, and the question of its consent to be sued is not, therefore, involved. The action is brought against the collector. The United States is not a party and has no interest in the litigation unless and until it voluntarily assumes the collectors' liability after action brought: *Sage v. United States,* 250 U. S. 33. R. S. 3226 is not a consent of the United States to be sued, but merely provides a statutory remedy against the collector personally.

If that point be waived, and if we assume, contrary to fact, that R. S. 3226 is a statute evidencing the consent of the United States to be sued, the argument of those opposed to our view is still fallacious; for Sec. 611, far from amending or modifying R. S. 3226 in the slighest particular, does not even mention it. In the Acts of 1921, 1924 and 1926, wherein R. S. 3226 *was* amended, Congress evidenced its amending purpose and intent by setting out R. S. 3226 at length in the amended form. It is impossible to believe that they intended, in 1928, to amend R. S. 3226 without making any reference to it at all.

It is clear, therefore, that Sec. 611 is not a statute of limitations or amendment thereof, and has no reference to any judicial remedy either against the United States or a Collector of Internal Revenue or to consent of the United States to be sued. In short, the Gov-

ernment's construction will not stand analysis, and since the Government's argument on the constitutional question rests on the construction given to the section, the constitutional argument also must fall.

D.

IF SECTION 611 BE SO CONSTRUED AS TO PREVENT A TAXPAYER FROM RECOVERING A DEBT EXISTING AND FULLY VESTED PRIOR TO ENACTMENT OF THE REVENUE ACT OF 1928, IT VIOLATES THE FIFTH AMENDMENT.

Statutes of limitations usually go to the remedy only and may be amended. But Sec. 611 is not a statute of limitations and leaves all previous statutes of limitations as to assessment and collection of income taxes, contained in divers sections of prior acts, absolutely untouched. *A collection of 1917 tax made more than five years after the return was filed, even though claim in abatement was filed and collection stayed, is just as unlawful today as prior to the Act of 1928,* for the 1928 Act does not change the period of time within which a 1917 tax must be assessed and collected.

The Government may give or withhold its consent to be sued and, having given it, may condition or withdraw it. But the cause of action in this type of case is against the collector personally under R. S. 3226; moreover, even if R. S. 3226 were a consent by the Government itself to be sued, Sec. 611 does not change it in any particular.

If, therefore, Sec. 611 does prevent recovery of this pre-existing debt, it does not have that effect because it changes the period of limitation within which a 1917 tax must be collected or modifies or withdraws any *remedy,* but because *it destroys the pre-existing right or debt itself.*

Whatever the powers of Congress may be as to amending or repealing statutes of limitations, or withdrawing or modifying procedural remedies, or giving, withholding, withdrawing, modifying, or conditioning the consent of the United States to be sued, Congress does not have power to leave the definition of an unlawful collection just as before, to leave in full force and effect as to all taxpayers the consent of the United States to be sued for taxes unlawfully collected, and to prevent recovery on the part of a limited class of taxpayers by pronouncing the fully vested rights of that limited class destroyed or extinguished. That is the merest confiscation.

The United States may escape payment of its bonds by withholding its consent to be sued upon them. It may not, however, leave in full force and effect its previously given consent to be sued by any and all holders and escape payment of a certain few bonds of the series by pronouncing those particular debts extinguished; once in court, the United States stands like any other litigant: *United States v. Arredondo,* 6 Pet. 689; *Central Trust Co. v. Treat, Collector,* 192 Fed. 942. The absence of power in Congress to extinguish a debt owing by Rex B. Goodcell to Messrs. Graham and Foster is even more obvious.

A debt is property and may not be taken by the United States save by due process of law. Legislative fiat is not due process.

The Fifth Amendment "is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave Congress to make any process 'due process of law', by its mere will": *Den v. Hoboken Land and Improvement Co.,* 18 How. (59 U. S.) 272.

Most jurisdictions lay down the doctrine, without qualification, that a legislature may not remove the de-

fense of statute of limitations by repealing the statute after the defense has become complete: see cases at *12 C. J.* 980. This Court has not gone quite so far, holding that the mere procedural defense of statute of limitations is not a vested property right and permits the statute to be repealed, even if the period of limitation has wholly elapsed, when the effect of repeal is only to prevent interposition of the statute as a procedural defense.

All Courts, including this Court, agree, however, that a statute of limitations may not be repealed when, or to the extent that, *property rights have vested* by passing of the entire period of limitation: see cases cited at *12 C. J.* 981. Thus in the leading case of *Campbell v. Holt,* 115 U. S. 620, Mr. Justice Miller said:

> "It may, therefore, very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the Statute of Limitations by a legislative Act passed after the bar has become perfect, such Act deprives the party of his property without due process of law. The reason is that, by the law in existence before the repealing Act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the Act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law."

In other words, property rights that have become fully vested under a statute of limitations may not be divested by repeal of the statute. The rule applies *a fortiori* here, for Congress has not amended or repealed the statute of limitations, but, on the Government's theory of the effect of Sec. 611, has gone farther and undertaken to destroy the cause of action or debt itself.

In *Eberhart v. United States*, 204 F. 884, the Circuit Court of Appeals for the Eighth Circuit held that where by lapse of time sureties on a bond had ceased to be liable, Congress was without power to revive the liability. The concurring opinion of Judge Sanborn in that case presents our point fully. In his opinion Judge Sanborn held:

> "An act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates (*The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; *Pollard v. Bailey*, 20 Wall. 520, 526, 527, 22 L. Ed. 376; *Bank v. Francklyn*, 120 U. S. 747, 756, 7 Sup. Ct. 757, 30 L. Ed. 825; *Boyd v. Clark* (C. C.), 8 Fed. 849; *Brunswick Terminal Co. v. National Bank of Baltimore*, 99 Fed. 635, 638, 639, 40 C. C. A. 22, 25, 26), because such limitations are conditions of the liability itself and not limitations of the remedy only. They are excepted from the rule announced in *Campbell v. Holt*, 115 U. S. 620, 628, 6 Sup. Ct. 209, 29 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common-law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the Legislature may not overthrow at pleasure by extending the time for collecting it."

Judge Sanborn makes very clear the distinction between a repealing statute that merely removes the bar of the statute of limitations as a defense and a repealing statute that attempts to divest property rights previously vested under the statute repealed.

In *Wettengel v. Robinson, supra,* the Supreme Court of Pennsylvania clearly distinguishes the case of *Campbell v. Holt, supra,* upon which the Government strongly relies, as follows:

> *"Campbell v. Holt,* 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483, relied on by the government, decides simply that a statute which limits the time within which suit may be brought may be repealed, although, in the particular case under consideration, the statutory limitation had run before the repealing statute was passed. Its effect as a precedent has been limited, however, to cases where the repealed statute was purely one of limitation. On this point see *William Danzer & Co. v. Gulf & Ship Island R. Co.,* 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126, where *Campbell v. Holt* is distinguished, and it is held that, *if a statute both creates the liability and limits the time within which suit may be brought, the limitation cannot be repealed after the right to sue has been lost, because (page 637 of 268 U. S., 45 S. Ct. 612, 613) the 'effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment'."* (Italics ours).

In this brief, we have used the term "statute of limitations". It is generally used in these cases. Nevertheless, the statutes of limitations contained in the revenue acts are not of the same nature as, for instance, the six-year statute for suit on a contract, which is waived if not pleaded. They do not merely provide a defense to a suit entered by the Collector; in fact, the Collector will seldom or never enter a suit since he may proceed by distraint, and in the latter event the taxpayer has no opportunity to plead the statute of limitations or anything else. The effect of the statute

of limitations on income taxes is that the tax is *gone* when the five years have passed; the tax liability exists for five years and then, unless extended by statutory agreement between the Commissioner and the taxpayer, *expires*. When, therefore, Sec. 1106 (a) of the *Revenue Act of 1926* provided that running of the statute should not only bar the remedy but extinguish the liability, it recognized, rather than establish, a principle of law. In few if any of these cases has the statute been interposed as a defense; it has been the basis of an action against the Collector for collecting money that had ceased to be owing. It is of the essence of the *tax* that it be assessed and collected within the statutory period. The so-called period of limitation goes not merely to the remedy, but to the liability itself.

This Court suggests that view in *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346, 349:

> "The purpose of the enactment was to fix a time beyond which steps to enforce collection might not be *initiated*." (Italics ours).

And (351):

> "A reasonable view of the matter is that it was the intention of Congress by the clause here in question to protect taxpayers *against any proceeding whatsoever for the collection of tax claims not made and pressed within five years*." (Italics ours).

United States v. Heinszen & Co., 206 U. S. 370, and *Rafferty v. Smith, Bell & Co.*, 257 U. S. 226, are very different from this case. There, a tax had been imposed, but the imposing and collecting agencies were without authority. Their acts were ratified by retrospective legislation, which latter was sustained on the familiar doctrines that a principal may always ratify the previous act of his agent and that Congress could enact a taxing statute retroactively. In the case at bar

the Collector did not lack authority as agent of the United States; neither did Congress levy a tax retroactively; the cause of action was that, whether agent of the United States or not, he compelled the taxpayer to pay money which substantive law provided it should not be required to pay. Moreover the Statutes involved in those two cases specifically ratified the illegal acts of the collecting agents and levied a tax retroactively. There is no specific retroactive ratification of any illegal acts of the collecting agencies in either Sections 607, 611 or 612, and ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. *Forbes Pioneer Boat Line v. Board of Commissioners,* 258 U. S. 338.

When the five years had passed, this taxpayer ceased to owe the tax. If that proposition be denied, denial must be followed by admission that the Collector was without right—not merely without authority—to make the collection and in doing so acted contrary to express provision of the law—as the law existed then and *as it exists now.* Accordingly, on either theory, immediately after the collection in 1924 the Collector owed the taxpayer $9,039.40, which sum the taxpayer was authorized to recover back from him under R. S. 3226. The five-year provision of the law has not been changed; what was a legal wrong in 1924 is a legal wrong today. Moreover, R. S. 3226 remains as before; the collector is still liable to suit for any and all taxes erroneously or illegally collected. If, therefore, Sec. 611 prevents recovery, it is because Sec. 611 provides for extinguishment of the debt of $9,039.40 owed by the Collector to the taxpayer during some three and a half years before the section was enacted. Surely that cannot be done, especially when all courts agree that even an ordinary statute of limitations cannot be repealed without a saving of all property rights previously vested under it.

E.

THE FACT THAT THIS TAX WAS COLLECTED PRIOR TO THE PASSAGE OF THE ACT OF 1926 IS IMMATERIAL.

There are numerous cases involving the construction and effect of Sections 607 and 611 of the Revenue Act of 1928. In some, the tax was collected prior to the passage of the Revenue Act of 1926, while in others the tax was collected after the passage of the Revenue Act of 1926 and prior to the passage of the Revenue Act of 1928. In the latter cases the decisions have uniformly been in favor of the taxpayer: *Erie Coal & Coke Company v. Heiner,* 33 F. (2d) 135, affirmed by the Circuit Court of Appeals for the Third Circuit in 42 F. (2d) 214; *Diamond Alkali Company v. Heiner,* 39 F. (2d) 643; *Clinton Iron & Steel Company v. Heiner,* 30 F. (2d) 542; *Wyman, Partridge & Company v. United States,* 41 F. (2d) 886, *certiorari* granted October 20, 1930, at No. 416 October Term, 1930. In the former cases the majority of the decisions have been in favor of the Government, the following being in favor of the taxpayer: *United States v. Burden, Smith & Company,* 33 F. (2d) 229, *Cutcheon v. Rafferty,* 34 F. (2d) 708; *Sugarland Industries v. Bass,* 36 F. (2d) 375; and *Bessemer Coal & Coke Corporation v. Heiner,* 39 F. (2d) 492.

It is the writers' position that the date of collection is immaterial in view of the fact that the sections involved are administrative provisions dealing solely with the power and authority of the Commissioner to make voluntary credits or refunds and having no effect whatsoever on the right of the taxpayer to recover in an action against the Collector.

We do contend, however, that if the tax were collected after the liability had been extinguished, the

tax was actually overpaid and Congress had absolutely no constitutional power to re-create that extinguished liability.

We believe that in the instant case the answer should not be predicated upon whether the liability had been extinguished when the tax was paid, but whether it was extinguished when the Revenue Act of 1928 was passed. The right to recover the illegally collected tax vested in the taxpayer immediately upon collection, whether before or after the 1926 Act. Upon the passage of the 1926 Act that right to recover became irrevocably vested in the taxpayer.

F.

EVEN IF SECTION 611 BE HELD TO BE CONSTITUTIONAL, RETROACTIVE, AND NOT AN ADMINISTRATIVE PROVISION, IT IS NOT APPLICABLE TO THIS CASE, AS THE WORD "STAY" DENOTES MORE THAN A VOLUNTARY DELAY.

Prior to the Revenue Act of 1928 the filing of a claim in abatement did not toll or stay the running of the statute of limitations or stay the collection of the tax. *Appeal of Ocean Accident & Guaranty Corporation*, 6 B. T. A. 1045. Neither did it create an estoppel to assert the statute of limitations. *United States v. John Barth Co.*, 27 F. (2d) 782.

In the latter case the Circuit Court of Appeals for the Seventh Circuit held that full effect must be given to the statute of limitations notwithstanding that the taxpayer had filed a claim in abatement and had also given a surety bond for the amount of the tax. The court said:

"This express provision (for mutual consent in writing) covering tolling of the statute of limi-

tations excludes the possibility of implied waivers. *Expressio unius est exclusio alterus.*"

This case was reversed on other grounds by the Supreme Court on May 13, 1929, 279 U. S. 370, 73 L. Ed. 743.

In *Botany Worsted Mills v. United States,* 278 U. S. 282, 73 L. Ed. 379, the Supreme Court of the United States had before it a case where the taxpayer was alleged to have gone much farther than the filing of a claim in abatement, i. e., to have made a compromise and settlement with the Commissioner of Internal Revenue, but without the advice and consent of the Secretary of the Treasury and the Attorney General as required by R. S. Section 3299. The court held that the agreement was unenforceable because in conflict with the statute and that the unenforceable agreement would not estop the taxpayer to assert its rights with like effect as if the agreement had not been made. In the opinion Justice Sanford said:

"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

The Act itself predicates the tolling of the statute of limitations, not alone on the fact that a claim in abatement was filed, but also and conjunctively on the fact that the collection must be stayed as a result of the filing. The filing alone does not and never did automatically stay the collection of the tax. On the contrary Reg. 62, promulgated under the Act of 1921, specifically provided in Article 1032 that:

"The filing of a claim in abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and

leave the taxpayer to his remedy by a claim for refund."

Finally the Commissioner himself, by his General Counsel, has held that the filing of a claim for abatement does not extend the time for collection of the tax.

"The taxpayer filed a claim in abatement merely for the purpose of requesting a redetermination of his liability for the amount assessed. Manifestly, such a claim, which sets forth only the grounds relied upon to show that the tax is not due, containing no promise, either express or implied, to pay the tax, does not give rise to an understanding between the taxpayer and the Commissioner to treat any fact as settled. The situation, therefore, with reference to the collection of the tax, remains the same as before the claim was filed; the Commissioner is not precluded from instituting appropriate action for the collection thereof, nor has the taxpayer acquired a new or additional right to have the same postponed. As stated in article 1032, Regulations 62. (See quoted article, *supra*).

G. C. M. 2757, C. B. VII-2, page 302.

Even the filing of a bond with a claim in abatement does not toll the running of the statute of limitations, but the action thereafter is on the bond and not on the liability for the tax. *United States v. John Barth Co., supra.*

Therefore there must be some additional data or facts submitted which would show that the collection was stayed, not merely delayed, as a result of the filing of the claim in abatement. There must be some averment of a contract or agreement between the Com-

missioner or the Collector and the taxpayer to that effect. The mere fact that collection was not made is no evidence of a stay. A stay denotes an agreement not to collect or a prohibition on the right to collect. There was no prohibition on the Collector's right to collect, nor was there any right on the part of the taxpayer to require the Collector to postpone collection. A voluntary omission to enforce collection does not constitute a stay; for example, a private litigant cannot stay the running of the statute of limitations because he voluntarily elects not to enforce his rights. The statute of limitations runs notwithstanding. In order to effect a stay, whether of execution or of proceedings or of the statute of limitations, there must be a bilateral contract to that effect binding upon both parties, and no action of one party uncommunicated to the other will operate as a stay. The word "stay" as used in this Act signifies a legal stay. Were it otherwise, the word "delay" would be used.

The Commissioner has used the word "delay" in his Regulations promulgated under the Act, but he has no authority to read into the Act a meaning not intended by Congress. Congress could easily have used the word "delay" instead of the word "stay" had it intended to enact such a provision.

The defendant does not aver that the collection of the tax was stayed by him as a result of the filing of the claim in abatement. Neither do the stipulated facts disclose that the defendant Collector stayed or even delayed the collection of this tax on account of the filing of the claim in abatement.

Conclusion.

Our position has been briefly but effectively stated by the Hon. Robert M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania, in the case of *Clinton Iron & Steel Company v. Heiner,* 30 F. (2d) 542, at page 544, as follows:

"Congress may, under certain circumstances, ratify an erroneous collection of tax retroactively. *United States v. Heinszen & Co.,* 206 U. S. 370, 27 S. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; *Rafferty v. Smith, Bell & Co.,* 257 U. S. 226, 42 S. Ct. 71, 66 L. Ed. 208. The situation in the case at bar, however, is not that of the cases cited. In the instant case the tax was collected by the defendant as collector of internal revenue, at a time when existing statutory law declared that not only was the right of collection barred, but that the liability had been extinguished. The plaintiff, by statute, was denied relief by injunction. It could do nothing but pay the amount unlawfully demanded and seek its remedy in an action against the collector. Before bringing such action it was required by statute to first demand the return of the amount paid from the Commissioner of Internal Revenue, it is true; nevertheless the suit is not against the United States, but a personal action against the collector, based upon his illegal collection. The United States is interested not at all until and except its proper executive officer, in the exercise of a discretion conferred upon him by statute, adopts the liability of the collector as that of the United States. *Sage v. United States,* 250 U. S. 33, 39 S. Ct. 415, 63 L. Ed. 828.

"Keeping in mind the nature of the present action, it seems plain that section 611 of the Revenue Act of 1928 furnishes no defense to the defendant. That section is not a specific retroactive ratification of the illegal collection by the defendant as its agent (as were the statutes under consideration in *United States v. Heinszen* and *Rafferty v. Smith, Bell & Co., supra.*), but a statute designed to control the Commissioner and his agent. If it has any retroactive force, it is in respect to a demand upon the United States for the return of an amount voluntarily paid, and not in connection with a personal suit theretofore brought against a collector of internal revenue to recover an amount paid under duress at a time when no legal liability existed on the part of the taxpayer."

We respectfully submit that the judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

MAYNARD TEALL,

WILLIAM WALLACE BOOTH,

WILLIAM A. SEIFERT,
Counsel for American Refractories Company, Clinton Iron & Steel Company, Diamond Alkali Company, Spear & Company, and Bessemer Coal & Coke Corporation, as *Amici Curiae.*

EUGENE B. STRASSBURGER,
of Counsel for Spear & Company.

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CHARLES ELMORE

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930

No. 36

R. E. GRAHAM and E. E. FOSTER, Co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

VS.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America in and for the Sixth Collection District, State of California,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE.

MICHAEL F. GALLAGHER,
SAMUEL M. RINAKER,
Counsel for Illinois Kaolin Company.

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Illinois Kaolin Company, an Illinois corporation having a case pending involving the question presented in the above entitled cause, respectfully move that this Honorable Court grant leave to them, as *amici curiae*, to file the accompanying brief in this case. Counsel for both parties have consented to the filing of this brief.

MICHAEL F. GALLAGHER,
SAMUEL M. RINAKER,
Counsel for Illinois Kaolin Company.

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vs.

REX B. GOODELL, Former Collector of Internal Revenue of the United States of America in and for the Sixth Collection District, State of California,

Respondent.

BRIEF OF AMICI CURIAE.

STATEMENT OF THE CASE.

This is a suit to recover additional income taxes for the year 1917 which the petitioners were compelled to pay, and paid under protest, in 1924. The petitioners filed on March 22, 1918, their partnership income and excess profits tax return for the year 1917 and paid the tax due thereunder. In January, 1920, the Commissioner of Internal Revenue assessed an additional tax against petitioners for the year 1917. In February, 1920, petitioners filed a claim for abatement of the additional tax assessed, which claim was rejected by the Commissioner on December 27, 1922.

On March 22, 1923, the collection of the additional tax became barred by the statutory limitation applicable thereto. In November and December, 1924, the additional taxes were paid by petitioners under duress and under protest. On September 25, 1925, petitioners filed a claim for the refund of the money so paid on the ground that the additional tax was illegally collected because Section 250(d) of the Revenue Act of 1921 barred the collection of the tax after the expiration of five year from the date when return was filed. Petitioners' claim for refund was rejected by the Commissioner of Internal Revenue and on December 23, 1927, petitioners filed this suit in the United States District Court of California, in which court the case was tried upon a stipulation of facts and judgment was rendered in favor of petitioners on January 3, 1929.

Upon appeal the judgment was reversed by the Circuit Court of Appeals (9th Circuit) on the ground that petitioners' action for the recovery of the additional tax paid by them was barred by Section 611 of the Revenue Act of 1928 which provides that: payment of any additional internal revenue tax before the enactment of said Act should not be considered an overpayment under the provisions of Section 607 (relating to payment made after expiration of limitation on assessment and collection) of said Act, if, (1) such tax was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924; (2) a claim in abatement was filed; and (3) collection was stayed. The opinion of the court appears in 35 Fed. (2d) 586.

The Questions Presented.

The question before this Honorable Court is (1) whether Section 611 of the Revenue Act of 1928 should be construed to take away from the petitioners their right of action to recover an additional income tax paid by them under duress and under protest after the collection thereof had become barred by the limitation upon the collection thereof imposed by the Revenue Act of 1921; and (2) whether, if so construed, Section 611 of the Revenue Act of 1928, is in violation of the Fifth Amendment to the Constitution.

Contentions of Amici Curiae.

The Circuit Court of Appeals erred in reversing the judgment of the District Court in favor of the petitioners and in holding that the additional income tax for the year 1917, which petitioners paid under duress in 1924, was not illegally collected and recoverable. The decision of the Circuit Court of Appeals was erroneous because:

I. The additional income tax assessed against petitioners upon their income for the year 1917 was paid under protest in 1924 after expiration of the period within which its collection was authorized by the Revenue Act of 1921, and it is recoverable in an action at law.

II. Section 611 of the Revenue Act of 1928 is no bar to recovery in this suit (a) because this suit is not a claim under Section 607 of that Act but a suit commenced prior to its enactment, and (b) because neither Sections 611 nor 607 apply to suits at law.

III. Section 611 of the Revenue Act of 1928 by its terms is applicable only where collection of the tax "was stayed." It has no application where, as in this case, collection was merely delayed.

IV. Sections 611 and 607 of the Revenue Act of 1928 should not be construed to apply retroactively to claims for refund or suits filed prior to their enactment.

V. The tax liability, if any, of the petitioners was extinguished by the expiration of the period within which collection of the tax was authorized by the Revenue Act of 1921. Section 611 of the Revenue Act of 1928, if construed to revive that liability, violates the Fifth Amendment to the Constitution.

ARGUMENT.

I.

The additional income tax assessed against petitioners upon their income for the year 1917 was paid under duress and under protest in 1924, after expiration of the period within which its collection was authorized by the Revenue Act of 1921, and it is recoverable in an action at law.

The additional tax here involved was assessed in 1920 upon the income of the petitioners for the year 1917 and was paid under duress and under protest in November and December, 1924. The petitioners' income tax return for the year 1917 was filed on March 22, 1918, and on March 22, 1923, the collection of any tax upon income for the year 1917 became barred by the five-year limitation provisions of the Revenue Act of 1921. 42 Stat. 265. Section 250(d) of the Revenue Act of 1921, so far as applicable here, reads as follows:

> "The amount of income excess-profits or war profits taxes due under * * * prior income, excess-profits or war profits tax Acts * * * shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection; and no suit or proceeding for the collection of any such taxes due under this Act, or under prior income, excess-profits or war profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed."

With respect to the limitation provisions of the Revenue Acts of 1918 and 1921, this court said in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 350:

> "* * * Prior to the Revenue Act of 1918 there was no limitation against suit to collect income taxes. Section 250 (d) of the Act (40 Stat. 1083) required assessment within five years after return, and prohibited the commencement of suit or proceeding to collect such taxes after that period. This bar was held to apply only in respect of taxes for 1918 and later years. Then Sec. 250 (d) of the Act of 1921 made the limitation apply against collection of taxes under all the earlier Acts; and, in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors, prescribed the five-year period Act but allowed only four years as to those for 1921 and succeeding years. * * *"

In *Russell* v. *United States*, 278 U. S. 181, this court held that the period of limitation upon collection fixed by the 1921 Act was not extended by the Revenue Act of 1924 where assessment was made, as in this case, prior to the enactment of the 1924 Act.

We believe that it will be conceded that on December 23, 1927, when petitioners filed this suit they were clearly entitled to recover the additional tax so paid by them after its collection was barred by statutory limitation. Rev. Stats., Secs. 3220 and 3226; *Bowers* v. *New York & Albany Lighterage Co*, 273 U. S. 346; *Bowers* v. *Seaman*, 273 U. S. 346; *Seaman* v. *Bowers*, 297 Fed. 371; *Graham* v. *Du Pont*, 262 U. S. 234, 258.

II.

Section 611 of the Revenue Act of 1928 is no bar to recovery in this suit (a) because this suit is not a claim under Section 607 of that act but a suit commenced prior to its enactment, and (b) because neither Sections 611 nor 607 apply to suits at law.

Section 611 of the Revenue Act of 1928 and Section 607 of the Act, to which Section 611 refers, read as follows:

> "Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an over-payment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."
>
> "Sec. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

(a) Section 611, it will be observed, merely provides that a payment of taxes under the circumstances specified in that section "shall not be considered as an overpayment under the provisions of Section 607." This suit was commenced in 1927 before Section 607 was enacted and, of course, was not based thereon. Neither Section 611 nor Section 607 prohibit a suit to recover taxes paid under

compulsion after their collection had become barred by the Statute of Limitations. The right to recover by suit taxes so paid existed prior to the commencement of this suit by reason of Revised Statutes, Sections 3220 and 3226 as applied in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346.

There is in Section 607 no express repeal of the statutes authorizing a suit at law to recover a judgment for the amount of taxes collected after they had become barred by the Statute of Limitations, there is no conflict between the former and the latter, and there is no language in Section 607 rebutting the presumption against any implied repeal of those statutes. *Red Rock* v. *Henry*, 106 U. S. 596; *United States* v. *Healey*, 160 U. S. 136, 146; *Washington* v. *Miller*, 235 U. S. 422, 428.

(b) Section 611, which merely limits the rights conferred by Section 607, has no application here. Section 607 provides: that the payment of a tax after expiration of the period of limitation for the collection thereof shall be considered as an overpayment (which statement, if it were applicable to actions at law, would be merely declaratory of the law theretofore in effect); and "shall be *credited* or *refunded* to the taxpayer if *claim* therefor is filed within the period of limitation for filing such claim." These are not appropriate words of reference to a suit at law and cannot properly be so regarded when used, as here, in a section where no reference is made to suits at law. A "claim" is not a suit. A "credit" or "refund" does not aptly describe a judgment. These words are appropriate to direct the Commissioner of Internal Revenue as to his duty in the matter of claims and refunds and should be so construed. They have no application to the present suit instituted prior to the enactment of the Revenue Act of 1928, nor do they apply to any proceeding not based upon the said Section 607 of that Act.

The view that Sections 611 and 607 are administrative provisions, having no reference to suits to recover taxes illegally collected, but, designed to control the action of the Commissioner of Internal Revenue and his agents is supported by the opinion of the Circuit Court of Appeals of the Third Circuit in *Heiser* v. *Erie Coal and Coke Co.*, 42 Fed. (2d) 214. That opinion, without discussion of the matter, states that the court agrees with the District Court's interpretation of these sections in *Clinton* v. *Heiser*, 30 Fed. (2d) 542 (W. Dist. Pa.). In a later opinion which covers this point more fully, *Diamond Alkali Co.* v. *Heiser*, 39 Fed. (2d) 643, 644, the same District Court said:

> "* * * As stated in our opinion in that case (*Clinton* v. *Heiser*, 30 Fed. (2d) 542), section 611 (26 U. S. C. A. Sec. 2611) was designed to control the Commissioner in crediting or refunding tax erroneously paid or collected. Section 3220 Rev. St., gave the Commissioner certain powers in respect to such credit or refund. These powers were curtailed by sections 1111, 1106, and 284 of the Revenue Act of 1926 (26 U. S. C. A. Secs. 149, 149 note, 1065), by which the Commissioner's authority to voluntarily refund taxes paid was confined to overpayments. Where the demand for refund was based upon the lapse of the statutory period of limitation, the Commissioner was denied the power of refunding or crediting the tax paid and the remedy was by suit. Section 607 (26 U. S. C. A. Sec. 2607) conferred power upon the Commissioner to refund or credit such payments, the power being modified, however, by section 611. It was necessary to give effect to section 607, to repeal section 1106(a) of the Act of 1926, which prohibited the Commissioner from making a refund unless there had been an overpayment. In short, sections 607, 611, and 612 of the Act of 1928, and section 1106(a) of the Act of 1926, *are administrative provisions* and do not destroy any right of action against the collector in the taxpayer; and the taxpayer undoubtedly had a right of action upon collection of the assessed tax being made in the face of the statute then in force, section

1106(a) of the Act of 1926, which declared that the bar of the Statute of Limitations shall not only bar the remedy but shall extinguish the liability."

Certain of the Federal Court decisions dealing with Section 1106 of the Revenue Act of 1926 also support the view that the use in a section of the Revenue Act of such administrative terms as "claims," "credits," and "refunds" to describe the proceedings and relief contemplated indicates that suits at law are not contemplated. *Thornhill Wagon Co.* v. *Noel,* 17 Fed. (2d) 407 (E. Dist. Va.); *Gove* v. *Nichols,* 23 Fed. (2d) 856 (Dist. Mass.); *Ellay Co.* v. *Bowers,* 25 Fed. (2d) 637 (C. C. A. 2d Cir.) (Certiorari denied 277 U. S. 606).

III.

Section 611 of the Revenue Act of 1928 by its terms is applicable only where collection of the tax "was stayed." It has no application where, as in this case, collection was merely delayed.

One of the three essential facts which Section 611 of the Revenue Act of 1928 specifies must exist in order that a payment made after the expiration of the Statutes of Limitation "shall not be considered an over-payment under the provisions of Section 607" of that Act is that collection of the tax in question "was stayed."

In the instant case the Circuit Court of Appeals held that the word "stay" as used in Section 611 does not mean a legal restraint, but means merely a voluntary delay such as occurred in this case.

In sharp conflict with the opinion in the case at bar is the opinion of the Circuit Court of Appeals of the Fifth Circuit in the case of *United States* v. *Burden, Smith & Co.,* 33 Fed. (2d) 229. Both opinions deal chiefly with the

word "stayed" in Section 611. In *United States* v. *Burden, Smith & Co.*, the Court rested its decision in favor of the taxpayer on the ground that mere delay in collection of the tax did not constitute a stay of collection within the meaning of Section 611. Other reported decisions in favor of the taxpayer resting in whole or in part upon this ground are *Cutcheon* v. *Rafferty*, 34 Fed. (2d) 708 (E. Dist. N. Y.); *Pepsin Syrup Co.* v. *Schwaner*, 35 Fed. (2d) 197 (So. Dist. Ill.); *Sugarland Industries* v. *Bass*, 36 Fed. (2d) 375 (W. Dist. Tex.); *Taubel* v. *Sturgess* (U. S. Dist. Co. N. J.) Decided November 8, 1930; Reported C. C. H. Fed. Tax Service 1930, Vol. III, p. 9187, paragraph 9657). In *Pigott* v. *Poe*, 41 Fed. (2d) 273 (W. Dist. Wash. N. D.) the Court decided against the taxpayer holding, however, that in that case there had been a stay of collection in the legal sense.

The word "stay" is defined in Anderson's "Dictionary of Law" as follows:

> "To interrupt, arrest, suspend. Used also as a noun: as, stay of judgment, sentence, execution, or other proceeding. See STET; SUPERSEDEAS.
>
> "May result from an agreement, an order of court, or the operation of law—as, when an appeal, a writ of error, or a *certiorari* is perfected by bail being furnished and the requirements of the law in other respects observed. See ERROR, 2, (3), Writ of."

1. In support of its conclusion that "stayed" in Section 611 means "delayed," the Court said that no provision of law could be pointed out which would operate as a stay where no bond was filed with the claim in abatement, and Section 611 refers to a stay where a claim in abatement was filed, with or without bond.

The only provision in any of the Revenue Acts prior to June 2, 1924, for filing a bond with a claim in abatement is contained in the Revenue Act of 1918, Section 214 (a), par. (12), and Section 234 (a), par. (14). By those sections

it was provided that where the taxpayer had sustained in the year 1918 a substantial loss from reduction of inventory value he might file with his return for that taxable year a claim in abatement of the tax on the ground of such loss, and that:

> "In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest."

When Section 611 refers, as it does, to the filing of a claim in abatement with bond, it must be taken to refer to the only situation where the Revenue Acts prior to June 2, 1924, provide for filing a bond with a claim in abatement—the situation under the provisions of the 1918 Act just mentioned. In such a case collection of the tax "was stayed" in the legal sense of compulsory restraint. It is unreasonable to suppose that "stayed" as used in Section 611 was intended to mean "stayed" in the legal sense in one case and merely "delayed" in other cases.

Apart from the particular claim in abatement provided for in the sections of the 1918 Act mentioned above, claims in abatement have been filed, under a long standing practice of the Treasury Department, by taxpayers for the abatement of taxes believed to have been erroneously assessed, the general authority for such claims in abatement being Section 3220 of the Revised Statutes. The filing of such claims in abatement whether with or without bond, did not, in the absence of some special agreement with the collector, operate as any stay upon collection of the tax. The practice of the Treasury Department and its understanding as to the effect of such claims in abatement is shown by the following regulation which it promulgated as an integral

part of the regulations under which claims in abatement were filed:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax, or make it any less the duty of the Collector to exercise due diligence to prevent collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund." (Regulations 33, Art. 261; Reg. 45, Art. 1032; Reg. 62, Art. 1032.)

In emphasizing the absence of any statutory provision which would operate as a stay without a bond, the Court apparently overlooked the fact that a stay in the legal sense may result from agreement. Such a stay is shown in the case of *Pigott* v. *Poe,* 41 Fed. (2d) 273, 274, a case involving Section 611, where certain taxpayers to avoid the collection of an additional tax upon their income for the year 1917 entered into an agreement in the year 1923 with the Collector "that, in consideration of distraint and collection stayed, they would deposit security for payment of any taxes adjudged due." Such agreement, the Court held, "legally as well as morally" restrained the Collector from collecting the tax. In that case a claim in abatement was filed but it does not appear that any bond was filed with such claim and, although securities were deposited pursuant to the agreement between the taxpayers and the collector, it was the agreement that restrained collection of the tax.

In the case of *Taubel Inc.* v. *Sturgess,* decided by the United States District Court, District of New Jersey (Opinion filed November 8, 1930; reported C. C. H. Fed. Tax Service, 1930, Vol. 3, page 9187, par. 9657), that Court said in construing Section 611:

> "Having arrived then at the conclusion that 'stay' and 'delay' are not synonymous, and that the stay mentioned in the section does not refer to a judicial

stay and finding no law under which a statutory stay would become operative, we must look further.

"The Revenue Act vests the Commissioner of Internal Revenue with power to establish rules and regulations for the enforcement of the act, pursuant to which the Commissioner may have established rules where claims in abatement are filed, but no pertinent rule or regulation has been brought to my attention. It has been suggested that a stay may also have arisen under an agreement between the collector and the taxpayer suspending the operation of the limitation by staying the collector. A reasonable view to take concerning the meaning of the word 'stay' is: that it connotes a state of facts either under rules and regulations or under stipulations made pursuant thereto which would in effect restrain the collector from making collection pending the decision of a claim."

It is reasonable to suppose that in Section 611 Congress intended to provide that, where a taxpayer tied the hands of the Collector by a stay in the legal sense either by filing a bond, when it would have that effect as it would have only in one instance—under Sections 214 and 234 of the Revenue Act of 1918, or by an agreement to that effect, then a payment by that taxpayer after the expiration of the Statute of Limitation should not be considered an overpayment under Section 607; and that Congress intended to provide, on the other hand, where the collector's hands were not so tied, as they unquestionably were not by the mere filing of a claim in abatement, and where he merely delayed or neglected to collect the tax, that payment after the statute had run should be considered overpayment under Section 607. That reasonable distinction is, we submit, clearly made by the language of Section 611.

To construe "stayed" to mean "delayed" would result in unreasonable discrimination against taxpayers who filed claims in abatement. If collection was merely delayed and the collector was not restrained from collecting the tax, then the collector was just as free to proceed against tax-

payers who had filed claims in abatement as he was to proceed against taxpayers who had not filed such claims. Under a construction of "stayed" in Section 611 as meaning "delayed," therefore, the taxpayer who filed a claim in abatement would be penalized for the collector's voluntary delay and the taxpayer who had filed no claim in abatement would not be so penalized although the same voluntary delay existed in both cases. The unreasonableness of such a result should lead the court to avoid if possible a construction of the word "stayed" in Section 611 as meaning "delayed."

2. In support of its conclusion that "stayed" in Section 611 is not used in its legal sense but in a popular sense as a synonym of "delayed," the learned Circuit Court of Appeals quotes in its opinion general dictionary definitions of the word. We respectfully submit that these definitions as quoted lend weak support to the court's position. "Stayed" is used transitively in Section 611. Webster's Dictionary as quoted shows the specific transitive meaning of stay to be: "to stop, or more usually suspend, the progress of by judicial proceedings or executive mandate." And in the first definition quoted in the opinion from the Standard Dictionary is the following: "To stop the progress of; check; hold back; *not now usually* of *physical motion; as to stay the ravages of a pestilence or pangs of hunger.*" These definitions do not show a current, ordinary popular use of "stay" as a synonym of "delay," but tend to show that it is not so used.

In poetical, dramatic and Biblical writings "stayed" is frequently used transitively. Its use in such manner in other writings cannot be called incorrect, but we believe it is a matter of common observation and experience that "stayed" is now generally used popularly only in its intransitive sense, *e. g.*, stay at a place. Simple illustrations

will suffice to show that "stayed" and "delayed" are not synonymous in ordinary popular usage. To hear in conversation that an accident had "stayed" the arrival of a train would sound quaint and unfamiliar to anyone today. One would expect to hear, in that situation, and one would hear, that an accident had *delayed* the arrival of the train. To many people the first statement would not be intelligible; the second would be clear to everyone. Where a customer of a business had been slow in paying his account, we cannot imagine the ordinary business man saying that "payment of the account had been stayed" when he meant merely *delayed*. The learned Circuit Court of Appeals, in an effort to avoid giving to the word "stayed" its normal current meaning as a legal term, has given to it a meaning which is certainly not based upon the ordinary current popular usage, in the light of which, by the general rule, non-technical words in a statute are to be construed. A consideration of the words "stay" and "delay" in the light of current popular usage leads inescapably to the conclusion that, if Congress had meant "delayed" in the clause "if collection of any part thereof was stayed," it would have used the word "delayed."

3. "Stayed," as a transitive verb, is obviously a familiar legal term connoting a legal restraint; and it should be so construed in Section 611 in accordance with the rules of statutory construction repeatedly announced by this court. As this court said in *United States* v. *Fidelity Trust Co.*, 222 U. S. 158, 160, speaking there of a legal expression of more limited use in the law: "When it (the statute) speaks of interests absolutely vested in possession, we presume it uses familiar legal expressions in their familiar legal sense." Also in *United States* v. *Patterson*, 150 U. S. 65, 69, where the question involved the word "hearing" in a statute fixing the compensation of a Commissioner

"for hearing and deciding criminal charges," this court said:

> "* * * His compensation is limited to the specific services for which Congress has provided compensation, and *words and phrases of accepted meaning in legal phraseology must not, because they may be popularly used in a broader sense, be given, when found in a statute, that popular significance so as to enlarge the matters in respect to which compensation has been authorized and may be awarded.* * * *" (Italics ours.)

That is exactly what the court has done in the instant case—construed an accepted legal term in a broad and alleged popular sense so as to enlarge the matters in respect to which the section applies.

If "stayed" is construed as a legal expression the meaning is clear without inserting "legal" before the word which the lower court in its opinion said it was not empowered to do.

4. It is a familiar rule of construction of statutes that where the meaning of a word is clear in one section of a statute, the same word will be construed as having the same meaning in other parts of the statute, unless a contrary intent appears. And the rule applies to the use of the same word in other statutes relating to the same subject matter. *Pampanga Mills* v. *Trinidad*, 279 U. S. 211, 218; *United States* v. *Hill*, 123 U. S. 681, 685.

Applying this rule to the use of the word "stayed" in Section 611 of the Revenue Act of 1928, it appears that that word is used in three other places in that same Act—Section 273 (f) (g) (h), and with reference in each instance, as in Section 611, to a *stay* of collection of a tax. It is plain from the provisions of these subdivisions of Section 273 which are set forth in the Appendix to this brief that the word "stay" as there used is not a mere

voluntary *delay* of the collector but a legal restraint upon collection of the tax by him. In the other revenue Acts there are provisions in which the word "stayed" is used where it is equally obvious that the word is used in its familiar sense of a binding restraint upon action. Revenue Act of 1926, Sec. 279 (f) (g) (h), Sec. 283 (i), Sec. 1001 (c). Revenue Act of 1924, Sec. 279 (a).

We have found no instance in any of the Revenue Acts where "stay" is used with the meaning "voluntary delay" which the court in this case has given to the word in construing Section 611.

5. In support of its conclusion that the word "stayed" in Section 611 means "delayed," the learned Circuit Court of Appeals points to the title of Section 611: "Collections Stayed by Claims in Abatement." Since filing a claim in abatement did not stay collection of the tax, it is argued that "stayed" as used in the title must mean "delayed." It is equally true that filing a claim in abatement since it did not stay collection of the tax would not necessarily delay collection.

The brief titles of sections of an Act serve generally as a means of convenient reference, as a suggestion of what the section contains rather than as an accurate description of its contents.

As this court said in *Hadden* v. *The Collector*, 5 Wall. 107, 108:

> "At the present day, the title constitutes a part of the Act, but it is still considered only a formal part; it cannot be used to extend or restrain any positive provisions contained in the body of the Act. It is only when the meaning of these is doubtful that resort may be had to the title and then it is of little weight. It is seldom the subject of special consideration by the Legislature."

While in doubtful cases the title of a statute or of a section of a statute may be examined for a clue to the probable legislative intent, that is not this case. "Stayed" is a familiar legal term used in its familiar legal meaning in other sections of the same Act. Its use as a legal term in the body of Section 611 is free from any ambiguity. The title of the section can not properly be used to create an ambiguity where none otherwise exists. Nor is it proper to use the title of the section to resolve an ambiguity artificially created by reading into "stayed" in the body of the section a meaning which is not its legal significance and which, as we have pointed out above, is at variance with the ordinary popular use of the word. The title of Section 611 should not be used to extend its provisions to cases not plainly within its terms.

6. Also, in support of its view that "stayed" means "delayed," the lower court relies upon a Report of the Ways and Means Committee of the House of Representatives made at the introduction of the bill which with various modifications ultimately became the Revenue Act of 1928. The part of that report relied upon by the court is set out in its opinion in the case of *Huntley* v. *Gile*, 32 Fed. (2d) 857, 859. That report shows perhaps the intention at that time of that important Committee of one of the branches of Congress, but the language of that report must yield to the final expression of the intent of Congress in the language actually used in the Act. Section 611, in so far as the word "stayed" is concerned, is on its face free from doubt or ambiguity. As this court, speaking of Congressional Committee Reports and Debates, said in *Wisconsin R. R. Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 589:

> "Such aids are only admissible to solve doubt, not to create it."

Also in *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356, this court said:

> "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation but the words of the Act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports."

In applying the foregoing rules to Section 611 of the Revenue Act of 1928 the Circuit Court of Appeals (5th Circuit) in *United States* v. *Burden-Smith & Co.*, 33 Fed. (2d) 229, 230, properly said:

> "In support of this contention (that 'stayed' in Section 611 is used as synonym for 'delayed') reliance is had on the Report of the House Ways and Means Committee No. 2 of the 70th Congress, First Session, presenting the Bill. It is unnecessary to quote the language of the Report. Report of Committees of the House and Senate may be looked to as aids in construing ambiguous or conflicting terms of the statute but they cannot be taken as giving it a meaning not fairly within its words. *St. L. Iron Mountain & S. R. Co.* v. *Craft*, 237 U. S. 648."

While we believe it is clear that "stayed" as used in Section 611 of the Revenue Act of 1928 is used in its ordinary legal sense, if there were any doubt about the matter, the court should apply the rule laid down in *United States* v. *Merriam*, 263 U. S. 179, 187, 188, where this court said:

> "In statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

IV.

Sections 611 and 607 of the Revenue Act of 1928 should not be construed to apply retroactively to claims for refund or suits filed prior to their enactment.

From the opinion in the instant case (35 Fed. (2d) 587) it does not appear that the Circuit Court of Appeals considered at all the question whether Section 611 should be applied retroactively nor is the question considered in the earlier opinion of the same court in *Huntley* v. *Gile*, 32 Fed. (2d) 857, also dealing with Section 611.

The Circuit Court of Appeals of the Third Circuit in *Heiner* v. *Erie Coal & Coke Co.*, 42 Fed. (2d) 214, held that Section 611 did not prevent recovering a tax illegally collected after the Statute of Limitations upon collection had run and in the opinion said that it agreed with the District Court's interpretation of that section in *Clinton* v. *Heiner*, 30 Fed. (2d) 542 (W. Dist. Pa.). In the latter case the court said (Opinion, p. 545):

> "That section (Section 611) is not a specific retroactive ratification of the illegal collection by the defendant as its agent (as were the statutes under consideration in *United States* v. *Heinzen*, 206 U. S. 370, and *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226) but a statute designed to control the Commissioner and his agent."

And in *Bessemer Coal & Coke Co.* v. *Heiner*, 39 Fed. (2d) 492, the same District Court said of Section 611:

> "There are no words in the Act which can clearly be construed as a ratification of a tax which was barred by the Statute of Limitations at the time it was paid."

Section 611 provides that if a tax was assessed prior to June 2, 1924, and if a claim in abatement was filed "and if the collection of any part thereof was stayed, then the

payment of such part (made before or within one year after the enactment of this Act) *shall not be considered* as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." The words emphasized are manifestly words of prospective significance and that they are to be so construed is doubly clear when the words of the incorporated Section 607 are also considered. Section 607 provides that any tax "assessed or paid (whether before or after the enactment of this Act) after expiration of the period of limitation properly applicable thereto *shall be considered* an overpayment and *shall be* credited or refunded to the taxpayer if claim therefor *is* filed within the period of limitation for filing such claim."

It seems plain that what Congress intended to say and did say in the language which we have emphasized is that in the consideration of any claims for refund filed after the enactment of these sections the Commissioner should be governed by their provisions. It is immaterial that the payments in question may have been made prior to the enactment of this Act. What the section deals with is the consideration to be given to claims which might be filed and the disposition to be made of such claims. In dealing with this subject matter the words used are of future import. The words "if claim therefor is filed," particularly when taken with the other words, should be given a prospective effect. It is common usage to employ the verb in the present tense when speaking of the future.

There are are many sections of the Revenue Act of 1928 in which "is" is used in the same manner as in Section 607 and where it is clear from the subject matter of those sections that "is" must refer to some act in the future. For example in Section 56 (b) referring to taxes to be

paid under this Act are the words: "If any installment *is* not paid on or before the date fixed for its payment, etc." Sec. 56 (h) reads: "Every collector to whom any payment of any income tax *is* made, shall, etc.," the verb has a future significance.

In Section 507 of the Revenue Act of 1928 Congress used the following language:

> "Unless claim for credit or refund, or the petition, *was filed* within the time prescribed.". (Emphasis ours.)

And Section 702 of the same Act provides:

> "Unless claim for refund or credit * * * *has been* filed by the estate before the expiration of the period of limitation for filing claims." (Emphasis ours.)

These sections tend to show that where Congress in the Act in question intended to refer to claims filed in the past it used the past tense of the verb.

Also it appears that where a section of the Revenue Act of 1928 was intended to have retroactive effect that intention was not only plainly expressed in the body of such section but was also mentioned in the heading of the section. For example, the heading of Section 704 reads "Taxability of Trusts as Corporations—Retroactive"; of Section 705, "Installment Sales—Retroactive"; of Section 706, "Contributions to Charity—Retroactive." The word "retroactive" does not appear in the headings of either Section 611 or Section 607 and there are no words in either of those sections indicating that they were to have a retroactive effect.

While it would seem clear beyond any reasonable doubt that Sections 611 and 607 refer only to claims for refund filed after their enactment, if there were doubt about the matter that doubt should be resolved in accordance with the rule applicable to all statutes, and applicable *a fortiori* to

taxing statutes—that they should, if possible, be given a prospective effect.

In *United States Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 314, a case involving the question whether a right to bring suit had been taken away by an Act of Congress, this court said:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. *Dash* v. *Van Kleeck*, 7 Johns. 499; *Jackson* v. *Van Zandt*, 12 Johns. 168; *United States* v. *Heth*, 3 Cranch 399, 414; *Southwestern Coal Co.* v. *McBride*, 185 U. S. 499, 503; *United States* v. *American Sugar Co.*, 202 U. S. 563, 577."

In *Schwab* v. *Doyle*, 258 U. S. 529, 535, 536, in considering the Estate Tax Act, of September 8, 1916, this court said:

> "There is certainly no declaration of retroactivity 'clear, strong and imperative' which is the condition expressed in *United States* v. *Heth*, 3 Cranch 398, 413; also *United States* v. *Burr*, 159 U. S. 78, 82-83. If the absence of such determining declaration leaves to the statute a double sense it is the command of the cases that that which rejects retroactive operations must be selected."
>
> * * * * * *
>
> "But granting that the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it."

In *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162, this court said:

> "Statutes are not to be given retroactive effect or construed to change the status of the claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

The rule against retroactive construction just quoted was quoted and applied by this Court in *Russell* v. *United States*, 278 U. S. 181, 188, where this Court construed Section 278 of the Revenue Act of 1924 (43 Stat. 253) and, in holding that it should not be construed retroactively to extend time for suits to collect taxes assessed prior to the enactment of that Act, said:

> "No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in Section 278 or otherwise."

We respectfully submit that there is no language in Sections 611 and 607 of the Revenue Act of 1928 so "clear, strong and imperative" as to require that those sections be given a retroactive effect.

V.

The tax liability, if any, of the petitioners was extinguished by the expiration of the period within which collection of the tax was authorized by the Revenue Act of 1921. Section 611 of the Revenue Act of 1928 if construed to revive that liability violates the Fifth Amendment to the Constitution.

As we have pointed out above under Point I of this brief the additional tax here involved for the year 1917 was collected in November and December, 1924. The petitioners' return of income for the year 1917 was filed March 22, 1918, and the liability to pay any tax on income for the year 1917 expired on March 22, 1923, by the provisions of the Revenue Act of 1921 then in force.

Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265) reads in part as follows:

> "The amount of income, excess-profits, or war-profits taxes due under * * * prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection; and no suit or proceeding for the collection of any such taxes due under this Act, or under prior income, excess-profits or war-profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed."

The above section was construed by this Court in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, and was considered by the court in *Russell* v. *United States*, 278 U. S. 181, in which it was held that the period of limitation upon collection fixed by the 1921 Act was not extended by the Revenue Act of 1924 (43 Stat. 299) where assessment was made, as in this case, prior to the enactment of the 1924 Act.

If by operation of Section 250 (d) of the Revenue Act of 1921 the liability to pay the additional tax ceased to exist on March 23, 1923, then the taxpayers in this case had a vested right to recover the property which was taken from them by the collector in November and December, 1924 to satisfy a non-existent liability, which right could not be divested by giving retroactive effect to Section 611 of the Revenue Act of 1928.

In *William Danzer & Co.* v. *Gulf Railroad Co.*, 268 U. S. 633, this court held that the two-year limitation fixed by the Interstate Commerce Act upon the filing of claims for reparation under that Act was a limitation upon the liability of the carrier and that a subsequent Act providing that the period of federal control should not be computed as part of the limitation period would not be construed re-

troactively to recreate a liability destroyed by lapse of the two-year period, because so construed it would deprive the carrier of its property without due process of law in violation of the Fifth Amendment to the Constitution. In that case this court said, p. 635:

"Plainiff's cause of action was created and limited by the Interstate Commerce Act * * *."

Page 637:

"* * * That case (*Campbell* v. *Holt*, 115 U. S. 620) belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. **But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability.** Such, for example, are statutory causes of action for death by wrongful act; *The Harrisburg*, 119 U. S. 199, 214; and those arising under the Federal Employers' Liability Act, c. 149, 35 Stat. 65. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette*, 239 U. S. 199, 201; *Kannellos* v. *Great Northern Ry. Co.*, 151 Minn. 157, 160; *Jones* v. *D. L. & W. R. R. Co.*, 96 N. J. L. 197. See also *Davis* v. *Mills*, 194 U. S. 451, 454. **This case belongs to the latter class. Section 206 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment.** Cf. *Levy* v. *Wardell*, 258 U. S. 338, 340; *Union Pacific R. R.* v. *Laramie Stock Yards*, 231 U. S. 190, 200; *Winfree* v. *Northern Pacific Ry. Co.*, 227 U. S. 296, 301." (Emphasis ours.)

In *Davis* v. *Mills*, 194 U. S. 451, 454, this court said:

"* * * It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex jori*, as affecting the remedy only and not the right. *But in cases where it has been possible to escape from that qualification by a reasonable*

distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. *The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."* (Emphasis ours.)

A provision such as that in Section 250 (d) of the Revenue Act of 1921 limiting the period within which taxes may be collected is not a statute of limitations at all in the sense in which that expression is applied to general statutes prescribing the time within which the remedy must be pursued to enforce various rights of action. For want of a better terminology the words are loosely but generally used in common practice to express two ideas which are fundamentally and radically different. Where an act refers to the statute of limitations, as do Section 607 and 611 of the Revenue Act of 1928, it is necessary to examine such limitation statute in all its relations to determine whether it operates to extinguish a liability or to suspend a remedy. Section 607 in its reference to the statute of limitations can refer only to the limitations upon the collection of taxes provided in the various Revenue Acts.

The fact that a taxpayer can recover taxes paid by him after the expiration of the statutory period of limitation upon their collection in itself shows that the limitation here involved is not merely a matter of defense to a suit which may be pleaded or waived but is a condition of the liability itself.

By every test by which a limitation statute is construed as extinguishing the liability, Section 250 (d) of the Revenue Act of 1921 must be held to have that effect. Any authority to collect taxes is purely statutory. Tax liability exists solely by virtue of a statute, one of a class of statutes, moreover, in which any doubt as to whether liability has been created will be resolved against the existence of the liability. *United States* v. *Isham*, 17 Wall. 496, 504. The limitation in question is an integral part of the series of closely related and interwoven Revenue Acts by which the liability was created and the manner of its enforcement provided for.

In various decisions of the Federal courts construing Section 250 (d) of the Revenue Act of 1921 it has been held that the limitation upon collection therein provided was a limitation upon the liability and not merely a limitation of the remedy. It was so held in *Bashara* v. *Hopkins*, 290 Fed. 592 (N. D. Texas), affirmed 295 Fed. 319, (Certiorari denied by this Court, 265 U. S. 584). In *Citizens Bank of La Fourche* v. *Miller-Link Lumber Co.*, 16 Fed. (2d) 163, 164, the same court said of said Section 250 (d) of the Revenue Act of 1921:

> "The law that creates the right to collect the taxes, by its terms, provides that no suit or proceeding for the collection of them shall be begun after the expiration of five years after the date when the return was filed. The claim becomes to all intents and purposes extinguished after that time."

In *United States* v. *John Barth Co.*, 27 Fed. (2d) 782, 784, the Circuit Court of Appeals of the 7th Circuit said in a case where collection of a tax was barred by Section 250 (d) of the Revenue Act of 1921:

> "In general, it may be said that statutes of limitation bar only remedy. But the different statutory enactments on the subject of time limitations upon the determination and assessment of income taxes cul-

minating the Act of 1926 indicate an intent not merely to bar the remedy but to extinguish entirely all liability for the tax where its determination and assessment is not made within five years after filing the return."

The decision of the Circuit Court of Appeals in *United States* v. *John Barth Company* was reversed by this court in 279 U. S. 370, upon other grounds.

Language in the opinion of this court in *Russell* v. *United States*, 278 U. S. 181, 187, indicates that the provisions in the Revenue Acts limiting the time within which taxes may be collected affect the liability of the taxpayer and not merely the remedy of the Collector. In that case this court said:

> "Manifestly, but for Sec. 278 petitioners would be *free from liability under the five year limitation in the Act of 1918,* continued by the Act of 1921. If Sec. 278 refers only to assessments made after June 2, 1924, petitioners are not liable.
>
> If an assessment made before that date came within the ambit of Sec. 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years *a liability which had almost expired* * * *." (Emphasis ours.)

In certain of the decisions of the Federal Courts construing Sections 611 and 607 of the Revenue Act of 1928, as barring the taxpayers' recovery in such a suit as this one, the cases of *United States* v. *Heinszen*, 206 U. S. 370 and *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226 have been cited. In those cases it was held that an unauthorized collection of taxes could be ratified by Congress. Those cases are not in point here because in both of them there was involved an act of Congress expressly "legalizing and ratifying" the unauthorized collection. Section 611 does not expressly ratify any collection of taxes. In neither of the two cases mentioned had the liability to pay the taxes there involved

been extinguished by operation of a statute prior to the enactment of the ratifying act. The tax here involved had been so extinguished prior to the enactment of Section 611 of the Revenue Act of 1928.

CONCLUSION.

We respectfully submit that Section 611 of the Revenue Act of 1928 does not apply to lawsuits; that it was erroneously applied by the Circuit Court of Appeals to the present case by the adoption of a strained and unreasonable interpretation of the language used in that section, giving to the section an operation that is arbitrary and unreasonably discriminatory; that Section 611 need not be and should not be construed to have a retroactive effect; that it can not be construed as reviving tax liability of petitioners, which had been extinguished by the Revenue Act of 1921, without depriving petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution; and that for each and all of these reasons the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

MICHAEL F. GALLAGHER,
SAMUEL M. RINAKER,
Amici Curiae.

APPENDIX.

Revised Statutes, Section 3220:

"Except as otherwise provided in Sections 284 and 319 of the Revenue Act of 1926, the Commissioner of Internal Revenue, subject to the regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section. (R. S. Sec. 3220; Feb. 24, 1919, c. 18, Sec. 1316(a), 40 Stat 1145; Nov. 23, 1921, c. 136, Sec. 1315, 42 Stat. 314; June 2, 1924, 4:01 p. m., c. 234, Sec. 1011, 43 Stat. 342; Feb. 26, 1926, c. 27, Sec. 1111, 44 Stat. 115. * * *)"

Revised Statutes, Section 3226:

"Suits for recovery of taxes wrongfully collected. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the

Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail. (R. S. Sec. 3226; Feb. 27, 1877, c. 69, Sec. 1, 19 Stat. 248; Nov. 23, 1921, c. 136, Sec. 1318, 42 Stat. 315; Mar. 4, 1923, c. 276, Sec. 2, 42 Stat. 1505; June 2, 1924, 4:01 p. m., c. 234, Sec. 1014 (a), 43 Stat. 343; Feb. 26, 1926, c. 27, Sec. 1113 (a), 44 Stat. 116.)"

Revenue Act of 1928, Section 273. Jeopardy Assessments:

"(f) Bond to stay collection.—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in section 297.

(g) Same—Further conditions.—If the bond is given before the taxpayer has filed his petition with the Board under section 272(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such subsection, then the amount the collection of which is stayed by the bond will be

paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subsection.

(h) Waiver of stay.—Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 36.

R. E. GRAHAM and E. E. FOSTER, Copartners, Doing Business Under the Firm Name of MILLIE FRANCIS OIL COMPANY, a Copartnership,

Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE.*

HUGH SATTERLEE,
I. HERMAN SHER,
ALBERT S. LISENBY,
Amici Curiae,
1016 Munsey Building,
Washington, D. C.

WEILL, WOLFF, SATTERLEE & BLAKELY,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 36

R. E. GRAHAM and E. E. FOSTER, Copartners, Doing Business Under the Firm Name of MILLIE FRANCIS OIL COMPANY, a Copartnership,

Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE.*

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Tobacco Products Corporation, of New York, in a pending case involving the same

question at issue in the above-entitled case, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

HUGH SATTERLEE,
I. HERMAN SHER,
ALBERT S. LISENBY,
Amici Curiae.

WEILL, WOLFF, SATTERLEE & BLAKELY,
Of Counsel.

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BRIEF OF *AMICI CURIAE.*

Statement.

This case was tried upon a motion for judgment upon the stipulated facts before the District Court for the Southern District of California, which, in January, 1929, decided that the petitioners were entitled to recover alleged taxes of $7,034.71 and alleged interest thereon of $2,004.69, or a total of $9,039.40, which they had paid to respondent after the statutory period of limitations for the collection thereof had expired (R. 15-19). The Circuit Court of Appeals, in

an opinion rendered November 4, 1929 (R. 36), reversed the decision of the District Court, on the ground that Section 611 of the Revenue Act of 1928 barred recovery by the petitioners. A writ of certiorari was granted by this Court on March 3, 1930.

The pertinent dates are as follows (R. 11-14):

March 22, 1918, return for 1917 filed.
January, 1920, additional assessment made.
February 11, 1920, claim in abatement filed.
December 27, 1922, claim in abatement rejected.
March 22, 1923, expiration of five year period for collection of tax.
November 19, 1924, notice and demand for payment of tax issued.
November 29, 1924, and December 3, 1924, tax collected.
September 25, 1925, claim for refund filed.
January 13, 1926, claim for refund rejected.
December 23, 1927, suit commenced.

Statutes.

The statutes immediately involved are Sections 607 and 611 of the Revenue Act of 1928, enacted May 29, 1928, and are as follows:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax)

was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

ARGUMENT.

Summary.

The right of the petitioners to recover the payments of alleged taxes arbitrarily enforced by the Collector when the collection of such alleged taxes was not legally enforcible would be undoubted, except for the subsequent enactment of Sections 607 and 611 of the Revenue Act of 1928. Section 607 merely characterizes as an *overpayment* a payment made after the running of the statute of limitations, and provides for the refund of such overpayment if claim therefor is filed within the statutory period. Section 611 withdraws from classification as overpayments within the operation of Section 607 cases having certain prescribed features. If, then, Section 607 does not repeal the law previously in force, so that a recovery could be had without resort to Section 607, Section 611 is also inapplicable. Even though Section 607 be held applicable, a recovery may still be had if the case does not fall unmistakably within the provisions of Section 611. Moreover, Section 611, if construed to embrace a case such as the present, is unconstitutional.

Accordingly, the following points are submitted:

I. The petitioners' right to recover is a common law right of *assumpsit* against the respondent personally for

money had and received, and is not based upon Section 607 or affected by Section 611 of the Revenue Act of 1928.

II. Section 611 of the Revenue Act of 1928 is not applicable to the present case.

A. Sections 607 and 611 of the Revenue Act of 1928 relate solely to administrative refunds and credits and are not applicable to recoveries in the courts.

B. Section 611 does not apply to any case where the payment was made involuntarily prior to its enactment.

C. In Section 611 the term "stayed" means something more than "voluntarily delayed".

1. That Congress had in mind something more than voluntary delay in collection when it used the term "stayed" in Section 611 may be gathered from earlier legislation in which this word or some similar expression was used.

2. That Congress recognized that the filing of an abatement claim did not in itself stay the collection of the tax is shown by its imposition of the qualifying clause, "if the collection of any part thereof was stayed", as well as by the history and practice relating to abatement claims.

3. Congress must have meant by "stayed" something more than voluntary delay in collection, because in every case to which Section 611 could be applied, assuming the omission of the conditional clause in question, there was delay in collection.

4. All of the provisions and conditions of Section 611 can be given effect if "stayed" is construed as meaning more than merely voluntary delay by the collector.

D. Within the meaning of Section 611 collection of the tax was not stayed, because petitioners' claim in abatement was rejected before the statute of limitations expired.

III. The bar of the statute of limitations against the United States in respect of the tax in suit not only operated to bar the remedy, but extinguished the liability under the common law and under the provisions of Section 1106(a) of the Revenue Act of 1926.

A. Under the common law.

B. Under the provisions of Section 1106(a).

C. Section 612 of the Revenue Act of 1928 could not revive a tax liability already extinguished.

IV. Section 611 as applied to the present case is unconstitutional because it takes property without due process of law.

A. The question at issue is not whether Congress may impose a retroactive tax, but whether it may take away from a private person a right to recover money that is absolutely due when the Act is passed.

B. The application of Section 611 to the case at bar would unconstitutionally deprive the petitioners of the vested claim which they had against the respondent at the time of its enactment.

C. Section 611 if construed as reimposing the tax or ratifying its collection is so arbitrary and capricious as to be void under the Fifth Amendment.

V. In any event Section 611 does not prevent the recovery of the interest in question in the present case.

The legislative history of Section 611, together with the comment of the American Bar Association Committee on Federal Taxation on original Section 611, is given in an appendix to this brief.

I.

The petitioners' right to recover is a common law right of *assumpsit* against the respondent personally for money had and received, and is not based upon Section 607 or affected by Section 611 of the Revenue Act of 1928.

Upon payment of the sums in question in the present case in 1924, when the collection thereof was barred by the statute of limitations applicable thereto, the petitioners acquired an absolute right to recover in an action against either the respondent or the United States on the ground

that the amounts collected were barred by the statute of limitations. *Graham* v. *DuPont*, 262 U. S. 234; *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346; *The Ellay Company* v. *Bowers*, 25 Fed. (2d) 637, certiorari denied 277 U. S. 606; *Peerless Woolen Mills* v. *Rose*, 24 Fed. (2d) 576; *Erie Taxi Co.* v. *Gnichtel*, 17 Fed (2d) 661; *Thornhill Wagon Co.* v. *Noel*, 17 Fed. (2d) 407.

The present suit against the respondent is not founded upon any statute, but is a common law action in *assumpsit*, for money had and received, against the respondent personally, and not against his office.

In the early administration of our customs laws a collector was held liable personally in a common law action of *assumpsit*, as for money had and received, for customs duties collected by him, if payment thereof was made under protest and duress, although he had paid the money into the Treasury of the United States. *Elliott* v. *Swartwout*, 10 Pet. (U. S.) 137. The collector was subjected to this liability because for his protection he had a right to retain the customs duties received by him. *Cary* v. *Curtis*, 3 How. (U. S.) 236. An Act of Congress of March 3, 1839, however, required collectors in all cases to pay over such moneys into the United States Treasury, and prohibited them from withholding any part thereof to await the result of any litigation. This deprivation of the right of retainer, it was held (*Cary* v. *Curtis*, *supra*), excluded the implied obligation or promise of the collector to repay the duties to the taxpayer, essential to the common law action of *assumpsit*, and therefore deprived the taxpayer of that action.

Upon the enactment of the Civil War income tax laws, Congress compelled collectors to pay all internal revenue taxes received or collected by them into the Treasury of

the United States, without any abatement or deduction on account of claims of any description (Section 3, Act of March 3, 1865; Section 3210, Revised Statutes). In the place of the old right of retainer, however, Congress provided for repayment to collectors of the full amounts of such sums of money as might be recovered against them in any court, for any internal revenue taxes collected by them, with the costs and expenses of suit (Section 3220, Revised Statutes, first enacted by the Internal Revenue Act of July 13, 1866). This Court then held that this allowance by Congress of the equivalent of the old right of retainer restored the common law obligation of the collector to repay the taxpayer the amount collected by him, and that the taxpayer could, therefore, again sue the collector in the common law action of *assumpsit* for money had and received. *City of Philadelphia* v. *The Collector*, 5 Wall. (U. S.) 720; *The Assessors* v. *Osbornes*, 9 Wall. (U. S.) 567.

In *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, this Court said (p. 31):

> "The right to sue the Collector for an unjustified collection was given by the common law."

Congress may, of course, limit the right of the taxpayer against the collector, as, for example, by providing against injunctions (Section 3224, Revised Statutes), requiring the filing of refund claims and limiting the time within which suit may be brought against the collector (Section 3226, Revised Statutes), and forbidding the issue of execution against the collector after a certificate of probable cause is granted (Section 989, Revised Statutes). See *White* v. *Weiss*, 7 Fed. (2d) 139. This fact, however, does not make the remedy against the collector a statutory remedy; and the several acts of Congress providing for the repayment

of excessive taxes, the payment of judgments against collectors, and the repayment to collectors of amounts recovered against them do not constitute a basis for an action against the collector. (See *Patton* v. *Brady*, 184 U. S. 608; *Coffey, et al.* v. *Exchange Bank*, 296 Fed. 807; *Fox* v. *Edwards*, 287 Fed. 669.)

The action against the collector for the recovery of taxes is personal and is not against the United States. *Sage* v. *United States*, 250 U. S. 33; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1. A judgment rendered in such an action is a personal liability unless and until the Court grants a certificate of probable cause, which permits payment of the judgment out of the United States Treasury. *Sage* v. *United States, supra.*

An analysis of Section 607 indicates that it was intended to apply to taxes *theretofore or thereafter* paid after the expiration of the period of limitation, and to provide for their refund to the taxpayer "if claim therefor *is* filed within the period of limitation for filing such claim." In other words, the section is applicable by express provision in the case of taxes paid before the enactment of the act, but is not applicable to claims for refund filed before the enactment of the act. There is no language extending the application of the section to claims for refund filed before the enactment of the act, and the strong implication from the context is that in this respect the section was not intended to be retroactive. Section 611 merely provides that in certain circumstances a payment of taxes shall not be considered as an overpayment under the provisions of Section 607, and it necessarily follows that, if Section 607 is inapplicable, Section 611 is likewise inapplicable.

Because petitioners' claim for refund was filed, and their suit was commenced and issue therein was joined, before

the enactment of Section 607, the action at bar is not and could not be based upon Section 607. That Section and Section 611 say nothing about actions in court or about collectors of internal revenue, and there is nothing in them which modifies, qualifies or derogates from the provisions of the common law.

II.

Section 611 of the Revenue Act of 1928 is not applicable to the present case.

A. Sections 607 and 611 of the Revenue Act of 1928 relate solely to administrative refunds and credits and are not applicable to recoveries in the courts.

The making of credits and refunds of overpayments of taxes, in the sense of their never having been due, has been authorized by each succeeding revenue act since the Revenue Act of 1916 (Section 14(a), Revenue Act of 1916; Section 252, Revenue Acts of 1918 and 1921; Section 281, Revenue Act of 1924; Section 284, Revenue Act of 1926; Section 322, Revenue Act of 1928). These sections have been held to have nothing to do with recoveries in the courts, but to relate solely to administrative credits and refunds by the Commissioner of Internal Revenue. (See *Fox* v. *Edwards*, 287 Fed. 669; *Coffey* v. *Exchange Bank*, 296 Fed. 807; *Alameda Inv. Co.* v. *McLaughlin*, 28 Fed. (2d) 81 (affd. 33 Fed. (2d) 120); *Winant* v. *Gardner*, 29 Fed. (2d) 836; *Rasmussen* v *Brownfield-Canty Carpet Co.*, 31 Fed. (2d) 89, 92; *Inland Products Co.* v. *Blair*, 31 Fed. (2d) 867, 868.)

Taxes collected after the statute of limitations applicable thereto expired were wrongful and illegal, but did not

constitute overpayments in the sense that the sums collected were never due as taxes. Such illegal collections were not, therefore, refundable under the sections cited above relating to overpayments, but were refunded under Section 3220 of the Revised Statutes, which, as amended by the Act of May 29, 1928, c. 901, 45 Stat. 986, 996, is as follows:

> "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section." (See Article 1301 of Regulations 69.)

Section 1106(a) of the Revenue Act of 1926 provided that "no credit or refund" in respect of a tax the liability for which was extinguished by the running of the statute of limitations "shall be allowed unless the taxpayer has overpaid the tax". This section, which perhaps in effect amended Section 3220 of the Revised Statutes, has been held to prohibit credits and refunds by the Commissioner of Internal Revenue and not to relate to suits in the courts.

Ellay Company v. *Bowers,* 25 Fed. (2d) 637, certiorari denied 277 U. S. 606; *Thornhill Wagon Co.* v. *Noel,* 17 Fed. (2d) 407; *Gove* v. *Nichols,* 23 Fed. (2d) 856.

In the case of *Adelaide F. Chapman* v. *United States,* 63 Ct. Cl. 424, the United States Court of Claims construed Section 1106(a) as preventing recoveries of barred taxes by suit unless the tax had been in fact overpaid. On application by the taxpayer to this Court for a writ of certiorari, however, the Solicitor General joined the taxpayer in opposing this construction of that section. At this stage the Revenue Act of 1928 was enacted, substituting Sections 607 to 611 thereof in place of Section 1106(a) of the Revenue Act of 1926, which was repealed by Section 612 of the 1928 Act "as of February 26, 1926", the date of its enactment. This substitution was obviously to clear up the existing confusion as to the meaning of Section 1106(a). Thereafter this Court, upon the motion of the Solicitor General, reversed the Court of Claims in the case of *Chapman* v. *United States, supra,* remanding the case with directions to enter judgment for the taxpayer (278 U. S. 660).

It is thus clear that Section 607 merely authorized what was prohibited by Section 1106(a), that is, administrative credits or refunds by the Commissioner where barred collections had been made, even though there was no overpayment in the sense that the tax was never due. Like the sections which preceded it, Section 607 therefore has nothing to do with rights of action in the courts. Section 611, which merely declares what "shall *not* be considered an overpayment under Section 607" was obviously intended merely to preserve in certain cases the prohibition against administrative refunds which was formerly contained in Section 1106(a), and, like Section 1106(a), was not intended to have any application to the rights of taxpayers

to sue and recover in the courts. *Diamond Alkali Co.* v. *Heiner*, 39 Fed. (2d) 643; *Southern Lumber Co.* v. *United States* (U. S. D. C., W. D. Ark., May 6, 1930), C. C. H. 1930 F. T. S., vol. III, D. 9519.

B. Section 611 does not apply to any case where the payment was made involuntarily prior to its enactment.

It has been expressly so held by different judges in the following cases: *Bessemer Coal & Coke Company* v. *Heiner*, 39 Fed. (2d) 492; *Clinton Iron & Steel Co.* v. *Heiner*, 30 Fed. (2d) 542, 545; *Erie Coal & Coke Co.* v. *Heiner*, 33 Fed. (2d) 135, aff'd in 42 Fed. (2d) 214; *Burden, Smith & Co.* v. *United States*, 32 Fed. (2d) 830, 831; *Southern Lumber Co.* v. *United States, supra.*

As already shown above, Section 611 was designed solely for the control of the Commissioner in crediting or refunding taxes. However, even if applied to recoveries in the courts, that section does not cover payments made under duress before its enactment.

Section 611 in terms applies to any "payment", in the circumstances therein stated, "made before or within one year after" its enactment. No distinction whatsoever is drawn between payments made before or after the enactment of that section. The Commissioner recognized that only such payments as were *voluntarily* made after the effective date of the 1928 Act, in the circumstances stated in Section 611, come within its provisions, and after such date refrained from compelling the payment of barred taxes (Mim. 3660, Cumulative Bulletin VII-2, p. 82; G. C. M. 4197, *Id.* p. 87).

This distinction between voluntary and involuntary payments is equally reasonable and required when applied to payments made before the enactment of Section 611.

C. In Section 611 the term "stayed" means something more than "voluntarily delayed".

The condition and limitation in Section 611, "if the collection of any part thereof was stayed", has occasioned more dispute than any other clause of the section. There are perhaps three possible meanings that may be assigned to the term "was stayed": (1) it may be construed as a legal, compulsory stay; (2) it may be construed as a mere voluntary delay; and (3) it may be construed as something less than a compulsory stay and something more than voluntary delay, namely, a stay by mutual agreement.

The syllogism of the courts which have construed the term "stayed" as mere voluntary delay by the collector may be stated as follows: (a) Section 611 refers to a claim in abatement with or without bond; (b) there is no legal, compulsory stay without bond; (c) therefore, in order to apply Section 611 to a claim without bond, "stay" must mean merely voluntary delay.

The fallacy of this reasoning lies in the erroneous assumption that the stay specified in Section 611 must be either a legal, compulsory stay, on the one extreme, or a mere voluntary delay, on the other.

In arguing the Government's position it is said that there is no provision of law which would operate as a compulsory stay in a case where no bond was filed with the claim for abatement. Therefore, according to the Government, the interpretation of "stay" as a compulsory stay would render the statute ineffective in the case of abatement claims without bonds. On the other hand, the conclusion of the Government that "stay" means merely voluntary delay by the collector goes too far, because, as in every case which could possibly come within the scope of Section 611, regardless of the clause in question, there was

delay in collection, the interpretation of "stay" as voluntary delay deprives the qualifying clause of any effect just as completely as if it were entirely omitted from the statute.

Although it would seem more reasonable, if there were a real dilemma, to disregard the words "without bond" rather than the whole clause, "if the collection of any part was stayed", nevertheless it is entirely possible to give adequate effect to both expressions.

1. That Congress had in mind something more than voluntary delay in collection when it used the term "stayed" in Section 611 may be gathered from earlier legislation in which this word or some similar expression was used.

Section 234(a)(14) of the Revenue Act of 1918 was apparently the first statutory authorization for the filing of abatement claims by taxpayers, although abatement claims had long been filed under the Treasury regulations. It provided that for 1918, with respect to inventory losses and rebates, a claim in abatement, with bond, could be filed with the return, and that "payment of the amount of the tax covered by such claim shall not be required until the claim is decided".

Section 279(a) of the Revenue Act of 1924 permitted the taxpayer to file a claim for the abatement of a jeopardy assessment of income tax, if accompanied by a bond, and provided that "upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be *stayed* pending the final disposition of the claim". Section 312(a) of the Revenue Act of 1924 made similar provision with respect to jeopardy assessments of estate taxes.

Section 279(f) of the Revenue Act of 1926 and Section 273(f) of the Revenue Act of 1928 provide that the tax-

payer may obtain a *"stay of collection"* of the whole or any part of a jeopardy assessment of an income tax by filing a bond with the collector, and Sections 279(h) and 273(h) of said respective acts provide that "upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be *stayed*". Section 312(f) and (h) of the Revenue Act of 1926 makes similar provision with respect to jeopardy assessments of estate taxes.

Section 603 of the Revenue Act of 1928 provides that a judicial review of the determination of a deficiency by the Board of Tax Appeals "shall not operate as a *stay* of assessment or collection" of any part thereof unless a bond is filed.

In *United States* v. *John Barth Company*, 279 U. S. 370, where this Court held that the statute of limitations applicable to the collection of income taxes assessed under the Revenue Act of 1918 did not apply to a bond filed with a claim for the abatement of such assessment under the authority of Section 234(a) of the 1918 Act, Mr. Chief Justice Taft, writing for the unanimous Court, said (p. 375):

> "The plain purpose of par. 14(a)—(Section 234(a), Revenue Act of 1918)—was to effect a substitution for the obligation arising under the return and assessment to pay the tax, of the contract entered into in the bond to pay any part of the tax found to be due upon the subsequent determination of the Commissioner, and this with interest at the rate of 1 per cent. per month from the time the tax would have been due, had no such claim been filed. Of course, it is not difficult in the somewhat complicated provisions to suggest, as on behalf of respondent it has been suggested, that some other than the ordinary inference to be given to this set of facts should be drawn; but the common sense view of the

> return and the delay in the payment due after the claim of abatement and the giving of the bond, is as already stated. The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit cannot be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given."

Congress specifically authorized the filing of abatement claims only if accompanied by bonds. It used the terms "stay", "stayed" and "stay of collection" in the several revenue acts in connection with the filing of bonds, both with and without abatement claims. As Section 611 of the 1928 Act and the preceding revenue acts are in *pari materia*, Congress doubtless used the term "stayed" in Section 611 in the same sense as in the prior revenue acts (*Marks* v. *United States*, 161 U. S. 297). It necessarily follows, therefore, that Congress used the word "stayed" in Section 611 much in the sense that a bond stayed collection, as held by this Court in *United States* v. *John Barth Company, supra*.

2. That Congress recognized that the filing of an abatement claim did not in itself stay the collection of the tax is shown by its imposition of the qualifying clause, "if the collection of any part thereof was stayed", as well as by the history and practice relating to abatement claims. If the filing of an abatement claim actually stayed the collection of the tax, it would have been foolish for Congress to insert what on its face is a condition, but which would be met in all cases.

Under Section 3220 of the Revised Statutes the Government has always had authority for the abatement of taxes erroneously assessed and has always entertained claims for abatement, except as restricted by recent income tax acts. The filing of an abatement claim never, in any sense, "stayed" the collection of the tax. The collector might collect the tax regardless of the claim, or he might require a bond or the deposit of securities, or a waiver of the statute of limitations, for forbearance in collection, or he might voluntarily or inadvertently delay collection, as quite often happened where no abatement claim was filed. But his responsibility was clear and his duty free from doubt.

Regulations 14 of the Treasury Department, containing the general regulations relating to the abatement of taxes, has for years expressly prescribed:

> "FILING OF A CLAIM FOR ABATEMENT DOES NOT OPERATE AS A DELAY OF COLLECTION.—The filing of a claim for the abatement of a tax alleged to have been erroneously assessed does not operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if necessary, collect the tax, and leave the taxpayer to his remedy by claim on Form 46."

A similar emphatic statement was embodied in Article 261 of Regulations 33 (revised), relating to the income taxes under the Revenue Acts of 1916 and 1917; in Article 1032 of Regulations 45, relating to the income taxes under the Revenue Act of 1918; and in Article 1032 of Regulations 62, relating to the income taxes under the Revenue Act of 1921. It is to claims for abatement filed under these acts that Section 611 purports to apply.

Article 1281 of Regulations 65, promulgated under the Revenue Act of 1924, which for the first time provided that the abatement claim must be accompanied by a bond, provided that upon the filing of the claim and bond, the collection of the assessment covered thereby "shall be *stayed* pending the final disposition of the claim".

Accordingly, although the Treasury permitted the filing of claims for the abatement of taxes assessed prior to June 2, 1924, without requiring that they be accompanied by bonds, it accepted such claims with the necessarily clear understanding, expressed over a period of many years, that the filing of such claims would in no way be permitted to delay or jeopardize collection of the tax. On the other hand, when after June 2, 1924, the Treasury said that collection of the assessment covered by the abatement claim shall be *"stayed"*, it, like Congress, used that term only in the situation where a bond was filed with the claim. That is, giving effect to the decision of this Court in *United States* v. *John Barth Company, supra*, the Treasury, like Congress, used the term "stayed" to mean something more than the delay of collection which might result from the collector's free exercise of his own volition.

3. Congress must have meant by "stayed" something more than voluntary delay in collection, because in every case to which Section 611 could be applied, assuming the omission of the conditional clause in question, there was delay in collection.

Clearly, to come within the provisions of Section 611 the abatement claim must have been filed *before* and collection must have been made *after* the statute of limitations ran (*G. C. M. 4879*, Cumulative Bulletin VII-2, p. 90; *G. C. M. 5665*, Cumulative Bulletin VIII-1, p. 130; *Neuland* v.

Bowers, 38 Fed. (2d) 842). In the case of every such abatement claim there was, therefore, some period of time, however short, during which the collector delayed collection. If the term "stayed" as used in Section 611 is construed to mean mere voluntary delay by the collector, it necessarily follows that in the case of every abatement claim referred to in Section 611 collection was stayed within the meaning of that section.

Not only is such a construction unauthorized by any of the revenue acts and contrary to the express provisions of all the regulations, but, if Congress had intended to use the term stayed in the sense of mere voluntary delay by the collector, it would have been natural and sufficient for it to enact Section 611 without the condition that collection shall have been stayed. The inclusion of that condition demonstrates conclusively that Congress had in mind that at least some of the abatement claims which it referred to in Section 611 did not stay collection, and is, therefore, conclusive evidence that Congress used the term stayed in Section 611 as meaning something more than mere voluntary delay in collection.

If stayed is construed to mean voluntary delay, its use in Section 611 is surplusage. Section 611 should, if possible, be so construed as to avoid an interpretation which renders the term stayed surplusage and so in effect amends the statute by striking out that word. (Compare *Cohen* v. *Gould* (S. Ct. of Minn.), 225 N. W. 435, 438.) Section 611 having expressly made itself applicable to abatement claims where collection was "stayed", and such an explicit statement of effect being meaningless if it was the intention to reach abatement claims generally, that is, where collection was merely voluntarily delayed, the inference follows that it was not the intention to apply the section to them when

collection was merely voluntarily delayed (see *Cohen* v. *Gould, supra*).

It was expressly so held by the District Court for the District of New Jersey in *William F. Taubel, Inc.* v. *Sturgess* (U. S. D. C., D. N. J., Nov. 8, 1930), C. C. H. 1930 F. T. S., vol. III, D 9657. This is the most recent case on the subject which we have been able to find. The Court in that case said:

> "The defense contends that the language of section 611: 'and if the collection of any part thereof was stayed' should be interpreted to mean merely 'a delay of proceedings to enforce collection by reason of the filing of a claim in abatement.' If such had been the legislative intent the phrase as used would be surplusage, since such interpretation would, beyond question, prevail if the phrase dealing with the word 'stay' had been entirely omitted from the section. Appearing, however, as it does, some meaning must be given to it if possible. * * * What, then, does the phrase relating to 'stay' mean? * * * A reasonable view to take concerning the meaning of the word 'stay' is: that it connotes a state of facts either under rules and regulations or under stipulations made pursuant thereto which would in effect restrain the collector from making collection pending the decision of a claim."

4. All of the provisions and conditions of Section 611 can be given effect if "stayed" is construed as meaning more than mere voluntary delay by the collector.

As we have seen, in some cases the filing of a bond with the abatement claim assured the collection of the tax and constituted a waiver in fact of the statute of limitations upon collection (*United States* v. *John Barth Company, supra*). In other cases the Government was similarly pro-

tected by a deposit of money in escrow, instead of the filing of a bond (*Pigott* v. *Poe,* 41 Fed. (2d) 273); by the making of a deposit in a bank as a guarantee of payment (*Mascot Oil Co., Inc.* v. *United States* (Ct. Cl), 37 Fed. (2d) 986); and by other forms of binding agreements. Section 611 includes all such arrangements of contractual stay where bonds were not filed.

An agreement properly entered into between the taxpayer and the Commissioner waiving the statutory period of limitations on collections permitted the Government to collect the tax, within the period agreed upon, after the statutory period of limitations expired, and such agreements were entered into in a large number of cases where abatement claims had been filed without bonds. Taxpayers executed such waivers because they were told by the Commissioner that consideration of their abatement claims could not be completed until after the statute ran, and upon the implied agreement, at least, by the Commissioner that he would, if waiver were filed, cause collection to be delayed until after his final action on the abatement claims. However, such of said waivers as were not executed strictly in accordance with the provisions of Section 250(d) of the Revenue Act of 1921 relating thereto did not, for that reason, constitute proper waivers under the statute, and have been held not to have waived the statutory period for collection (see *Nat'l. Tool Co.* v. *Routzahn,* 28 Fed. (2d) 914 (unlimited waiver and claim for credit); *Earle* v. *Commissioner of Internal Revenue,* 12 B. T. A. 96 (correspondence between the Commissioner and the taxpayer); *Wirt Franklin* v. *Commissioner of Internal Revenue,* 8 B. T. A. 977 (claim in abatement with bond); *G. C. M. 5739,* Cumulative Bulletin VIII-1, p. 127 (claim for overassessment and credit); *G. C. M. 4565,* Cumulative Bulletin VII-2, p. 169

(offer in compromise); *G. C. M. 2581,* Cumulative Bulletin VI-2, p. 95 (partial payment of additional assessment)). In such cases, where abatement claims were filed, if the statute had ostensibly been waived and collection had been delayed by reason of such waiver, it was perhaps for that reason unjust that a taxpayer should be permitted to recover the tax on the ground that it was collected after the statute ran. The most that Section 611 purports to do is to reach such cases, and those where deposits, guarantees, and similar binding agreements were involved, as well as those where bonds were filed.

The filing of an abatement claim in itself did not waive or extend the statutory period for collection (*G. C. M. 2757,* Cumulative Bulletin, VII-2, p. 302). Where nothing more was done by the taxpayer, the Government's failure to collect in due season was but the result of the negligence of its officers, to which the taxpayer in no way contributed.

Accordingly, by prescribing the condition in Section 611 "if the collection . . . was stayed" Congress contemplated some act of the taxpayer (*other than the mere filing of the claim in abatement*) which legally or morally tied the hands of the collector. *United States* v. *Burden, Smith & Company,* 33 Fed. (2d) 229; *Cutcheon* v. *Rafferty,* 34 Fed. (2d) 708; *Pepsin Syrup Co.* v. *Schwaner,* 35 Fed. (2d) 197; *Sugarland Industries* v. *Bass,* 36 Fed. (2d) 375.

D. Within the meaning of Section 611 collection of the tax was not stayed, because petitioners' claim in abatement was rejected before the statute of limitations expired.

The courts which have construed the term "stay" as voluntary delay by the collector proceeded upon the theory that the practice of the Bureau was to delay collection of taxes until abatement claims could be acted upon, it being

assumed at that time that there was no limitation on collection of an assessment by distraint; that because this assumption was held erroneous in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, it was found in many cases that the limitation on collection had expired while the claim in abatement was pending; that it is unjust that a taxpayer should be permitted to recover a tax on the ground that it was collected after the statute ran when in fact the statute expired while the collection was delayed by the abatement claim filed by the taxpayer; that Section 611 was enacted to meet this situation; and that the term "stayed" as used therein must, therefore, be held to mean voluntary delay. (See *Daniel Reeves, Inc.* v. *Anderson* (U. S. C. C. A., 2d Circ., July 21, 1930), C. C. H. 1930 F. T. S., vol. III, D 9494; *Imhoff-Berg Silk Dyeing Co.* v. *United States* (U. S. D. C., D. N. J., June 19, 1930), C. C. H. 1930 F. T. S., vol. III, D 9437; *North American Creamery Co.* v. *Willcuts*, 38 Fed. (2d) 483; *Regla Coal Co.* v. *Bowers*, 37 Fed. (2d) 373; *Wright & Taylor* v. *Lucas*, 34 Fed. (2d) 328.)

Accordingly, if, as these cases assume, the purpose of Section 611 was to withdraw the benefit of the statute of limitations from taxpayers who by filing abatement claims obtained a delay of collection until after the statute had run, Section 611 should have no application to cases where the delay in collection was caused by something other than the filing of an abatement claim. The Commissioner of Internal Revenue has so held (*G. C. M. 4879, supra; G. C. M. 5665, supra*).

Where the abatement claim was not rejected until *after* the statute ran it is possible that the collector in some cases voluntarily delayed collection until after the statute expired because of the pendency of the claim. Such cases present a nice question of fact, the proof of which has

given rise to some discussion (*Daniel Reeves, Inc.* v. *Anderson, supra*). In the present case there is no such embarrassment, for here the abatement claim was rejected three months *before* the statute of limitations expired, and the pendency of the claim could not possibly have caused the collector to delay collection until after the statute ran.

III.

The bar of the statute of limitations against the United States in respect of the tax in suit not only operated to bar the remedy, but extinguished the liability under the common law and under the provisions of Section 1106(a) of the Revenue Act of 1926.

A. Under the common law.

In *Campbell* v. *Holt,* 115 U. S. 620, this Court held that a statute of limitations on personal debts applied to the remedy only and might be repealed after the right of action against the debtor was barred because the statute of limitations in existence when the debt was incurred did not enter into or become a part of the *contract.* In later cases, involving *statutory obligations,* this Court distinguished *Campbell* v. *Holt* and held that the bar of the statute of limitations not only operated to bar the remedy, but extinguished the liability, because the statute of limitations was a constituent part of and operated as a limitation upon the *statutory liability. Danzer and Company* v. *Gulf and Ship Island R. R. Co.,* 268 U. S. 633; *Kansas City Southern Ry. Co.* v. *Wolf,* 261 U. S. 133; *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662; *Davis* v. *Mills,* 194 U. S. 451; *The Harrisburg,* 119 U. S. 199.

In *The Harrisburg* this Court said (p. 214):

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

In *Davis* v. *Mills*, Mr. Justice Holmes, writing for the unanimous Court and referring to the cases wherein the expiration of the statutory period of limitations extinguishes the liability, said (p. 454):

> "The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

This principle is equally applicable to the Government, that is, the United States may set up against itself a statute of limitations the expiration of which will absolutely extinguish its rights. See *United States* v. *Chandler-Dunbar Company*, 209 U. S. 447, 450; *Stockley* v. *United States*, 260 U. S. 532, 542.

Taxes are enforced contributions for the payment of public expenses (*Houck* v. *Little River District*, 239 U. S.

254, 265) and, although, when due, may be regarded as debts for the purpose of giving the Government priority in cases of insolvency (*Price* v. *United States,* 269 U. S. 492), they are not contractual obligations (*Lane County* v. *Oregon,* 7 Wall. 71; *United States* v. *Eggleston, et al.,* Fed. Cas. No. 15,027; *Meriwether* v. *Garrett,* 102 U. S. 472, 513). The claim of the United States for the payment of the tax obligation imposed by the revenue acts rests solely upon the statute, and when that statute provides that the tax can be collected only within a stated period of time, the limitation is necessarily a condition and part of the Government's right to collect and the taxpayer's obligation to pay the tax.

Section 250(d) of the Revenue Act of 1921, which is applicable to the case at bar, provides that income and profits taxes for 1917, among other years, "shall be determined and assessed within five years after the return was filed, . . . and no suit or proceeding for the collection of any such taxes . . . shall be begun, after the expiration of five years after the date when such return was filed". Thus the language of the statute is itself conclusive of the question involved. The law that created the obligation to pay and right to collect the taxes, by its terms, imposed the five-year period as a limitation upon such obligation and right and unmistakably indicated its purpose to extinguish the obligation and right by the lapse of time. Compare *Citizens' Bank* v. *Miller-Link Lumber Co.,* 16 Fed. (2d) 163; *Gove* v. *Nichols,* 23 Fed. (2d) 856; *Bessemer Coal & Coke Co.* v. *Heiner,* 39 Fed. (2d) 492.

That this was the purpose of the statute is clear. Mr. Hawley, a member of the House Committee on Ways and Means, which drafted the Revenue Act of 1921, in speaking on behalf of the proponents of the measure, on the floor

of the House, said (Congressional Record, Volume 61, page 5201) in reference to Section 250(d) of the Revenue Act of 1921 that it was "for the purpose of compelling the Government to close out its accounts with every taxpayer."

Continuing his address, Mr. Hawley stated:

> "A great many business transactions are suspended and are not consummated for the reason that the person intending to buy says: 'What liabilities are there on this property?' And, among others, there is stated to be a certain amount of tax in dispute. Men do not like to buy property, especially when the amount of tax in dispute is large. Many very important transactions have been lost, and this will open up the way to their settlement."

That the purpose of the statutes of limitations upon the assessment or collection of taxes which have been placed in the revenue acts is to enforce expedition upon the taxing authorities and insure that all tax liability shall cease upon the expiration of the periods of limitation is demonstrated by the successive reductions of the periods of limitation upon assessments and collections contained in the previous revenue acts. Compare Sections 250(d), Revenue Acts of 1918 and 1921, Sections 277 and 278, Revenue Acts of 1924 and 1926 and Section 275 of the Revenue Act of 1928, under which the periods of limitation on assessment have been reduced from five to two years from the date the return was filed, and with a fixed limitation in recent years of six years from the date of assessment within which collection may be had.

Income taxes collected after the statutory period of limitations, although due and owing prior to the running of the statutory period, are recoverable in actions at law against the collectors. *Graham* v. *DuPont*, 262 U. S. 234;

Bowers v. *New York and Albany Lighterage Company*, 273 U. S. 346. Such suits against collectors are not authorized by any statute, but must be brought as common law actions in *assumpsit*, for moneys had and received, and are personal to the collector, and not against his office. See Point I, *supra*; *Levy* v. *Wardell*, 258 U. S. 542; *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1; *Sage* v. *United States*, 250 U. S. 33; *Patton* v. *Brady*, 184 U. S. 608. Actions in *assumpsit* for money had and received are based upon the fact that the person taking the same had no right thereto. Accordingly, the only basis upon which recoveries could have been recognized in *Graham* v. *DuPont*, *supra*, and allowed in *Bowers* v. *New York & Albany Lighterage Co.*, *supra*, was that at the time collection was forced the taxpayer was not obligated for the sums collected as taxes.

Statutes of limitations which bar the remedy only are matters of defense, and do not form a basis for affirmative actions such as are here involved. It follows, therefore, that the running of the statute of limitations provided in the revenue acts not only barred the remedy, but extinguished the liability.

This precise question was raised in *Bashara* v. *Hopkins*, 290 Fed. 592, 595, where the taxpayer sued to enjoin a forcible collection by distraint after the statutory period for collection had run, on the ground that while this fact was open to him as a defense in a suit to enforce collection it was not available as a basis for recovery after collection by distraint. The District Court held, as did this Court in *Graham* v. *DuPont*, *supra*, that injuction would not lie since the taxpayer had a right to sue the collector and recover after collection by duress was had, distinguishing this type of case from *Campbell* v. *Holt*, *supra*, by the fact that the running of the statute *extinguished the liability*.

The courts which have held that the running of the period of limitations contained in the revenue acts merely bars the remedy have based their decision upon the authority of *Campbell* v. *Holt, supra,* and have wholly failed to show how a mere matter of defense can form the basis for an affirmative action in *assumpsit.* It seems to have been assumed in those cases (*Huntley* v. *Gile, et al.,* 32 Fed. (2d) 857; *Wright & Taylor* v. *Lucas,* 34 Fed. (2d) 328; *Regla Coal Company* v. *Bowers,* 37 Fed. (2d) 373; *Rockland & Rockport Line Corporation* v. *Ham,* 38 Fed. (2d) 239; *North American Creamery Co.* v. *Willcuts,* 38 Fed. 483; *Oak Worsted Mills* v. *United States* (Ct. Cl.), 36 Fed. (2d) 529), that actions against collectors in such cases are in themselves founded upon the limitations provisions of the revenue laws. Such is not the case, as these limitations provisions do not provide for suits for recoveries of sums collected in violation of such provisions. (See Point I, *supra.*)

The Court has held that limitations upon the time within which suits may be brought to recover taxes erroneously or illegally collected are substantive, and not mere matters of limitations to be raised as a defense. (*Cheatham* v. *United States,* 92 U. S. 85; *Arnson* v. *Murphy,* 115 U. S. 579, 586.) If limitations against the taxpayer are more than mere procedural limitations, then limitations against the United States ought to be similarly construed.

In the following cases it was held that the expiration of the statutory period of limitations upon the collection of income taxes extinguished the liability for the tax under the common law: *Citizens' Bank* v. *Miller-Link Lumber Co.,* 16 Fed. (2d) 163; *Bashara* v. *Hopkins,* 290 Fed. 592; *United States* v. *John Barth Company,* 27 Fed. (2d) 782, reversed on other grounds, 279 U. S. 370.

B. Under the provisions of Section 1106(a).

Section 1106(a) of the Revenue Act of 1926 provided that:

> "The bar of the statute of limitations against the United States in respect of *any internal-revenue tax* shall not only operate to bar the remedy but shall extinguish the liability; but no *credit or refund* in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. * * *" (Italics ours.)

In December, 1925, the United States Court of Claims, relying upon *Campbell* v. *Holt, supra,* and similar cases, decided in the case of *Toxaway Mills* v. *United States,* 61 Ct. Cl. 363, that the limitations contained in the Revenue Acts of 1918 and 1921 merely operated to bar the remedy and did not extinguish the liability. This decision resulted in the incorporation in Section 1106(a) of the above provision with respect to the bar of the statute of limitations.

The purpose of this enactment was declared in Conference Report on the Revenue Bill of 1926 (House Report No. 356, p. 55, 69th Congress, First Session) as follows:

> "AMENDMENT No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *U. S.*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft, C. J., in *Graham* v. *DuPont,* 262 U. S. 234, 256, 258.)"

Accordingly, the provision of Section 1106(a) of the Revenue Act of 1926 was intended merely to be declaratory

of the law, as it always had been, and was enacted to offset a contrary holding by the Court of Claims in the case of *Toxaway Mills* v. *United States,* 61 Ct. Cl. 363. Congress must, therefore, certainly have intended that the declaration in Section 1106(a) be applied to what had been done before as well as after its enactment.

The Court of Claims, in the case of *Adelaide F. Chapman* v. *United States,* 63 Ct. Cls. 424, construed Section 1106(a) of the Revenue Act of 1926 as preventing recoveries of barred taxes by suit unless the tax had been in fact overpaid. However, the Solicitor General joined the taxpayer in opposing this construction of Section 1106(a), stating in his brief for the United States on application to this Court by the taxpayer for writ of certiorari in the *Chapman* case that:

> "Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in *Graham* v. *Dupont, supra,* or prevent distraint proceedings by injunction and may be compelled by the collector to pay a tax the collection of which is barred by the statute of limitations, and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

As shown above (Point II A), for other cogent reasons, as well as those aforesaid, the provision in Section 1106(a) with respect to credit or refund relates solely to administrative credits and refunds and is not applicable to

recoveries in the courts, and has been so construed (*Ellay Company* v. *Bowers,* 25 Fed. (2d) 637, certiorari denied 277 U. S. 606; *Thornhill Wagon Co.* v. *Noel,* 17 Fed. (2d) 407; *Gove* v. *Nichols,* 23 Fed. (2d) 856).

In each of the *Toxaway Mills* and *Adelaide F. Chapman* cases, *supra,* the barred taxes were paid *before* the enactment of Section 1106(a), and this Court, on writ of certiorari, in each case, *after* such enactment, vacated the judgment and remanded the cause to the Court of Claims with directions to enter judgment for the taxpayer. (See *Toxaway Mills* v. *United States,* 273 U. S. 781; *Chapman* v. *United States,* 278 U. S. 660.) Section 1106(a) was also retroactively applied to extinguish the liability for the tax in other cases (see *Gove* v. *Nichols,* 23 Fed. (2d) 856; *United States* v. *John Barth Co.,* 27 Fed. (2d) 782, reversed on other grounds 279 U. S. 370; *Pepsin Syrup Co.* v. *Schwaner,* 35 Fed. (2d) 197, 199; *Wettengel* v. *Robinson,* 288 Pa. 362, 136 Atl. 673; *Carney Coal Co.* v. *Commissioner of Internal Revenue,* 10 B. T. A. 1397, 1403; *Appeal of D. C. Jackling,* 9 B. T. A. 312, 318).

C. Section 612 of the Revenue Act of 1928 could not revive a tax liability already extinguished.

The courts which have passed upon the question have held that where Congress has extinguished a tax liability it has no power to revive the liability, and that Section 612 can not, therefore, be retroactively applied so as to revive any tax liability that was extinguished under Section 1106(a) of the Revenue Act of 1926 (*Dobbins* v. *Commissioner of Internal Revenue,* 31 Fed. (2d) 935; *United States* v. *John Barth Co.,* 27 Fed. (2d) 782, reversed on other grounds in 279 U. S. 370; *Wyman, Partridge & Co.* v. *United States,* 41 Fed. (2d) 886; *Wettengel* v. *Robinson,* 288 Pa.

362, 136 Atl. 673; *Pepsin Syrup Co.* v. *Schwaner,* 35 Fed. (2d) 197; *Southern Lumber Co.* v. *United States* (U. S. D. C., W. D. Ark., May 6, 1930), C. C. H. 1930 F. T. S., vol. III, D 9519; *Peerless Woolen Mills,* 13 B. T. A. 1119).

This protection from revival by a change in the limitations law is certainly no less secure where the liability was extinguished by the common law.

IV.

Section 611 as applied to the case at bar is unconstitutional because it takes property without due process of law.

A. The question at issue is not whether Congress may impose a retroactive tax, but whether it may take away from a private person a right to recover money that is asolutely due when the act is passed.

It is, of course, well settled that a law of Congress imposing a tax may be retroactive in its operation. The courts which have held Section 611 to be retroactive (*Huntley* v. *Gile,* 32 Fed. (2d) 857, 859—followed below; *Wright & Taylor* v. *Lucas,* 34 Fed. (2d) 328, 333; *Regla Coal Co.* v. *Bowers,* 37 Fed. (2d) 373; *North American Creamery Co.* v. *Willcuts,* 38 Fed. (2d) 483) based their decisions on that principle and the supposed analogy of *United States* v. *Heinszen & Co.,* 206 U. S. 370, and *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226, wherein the right of the Philippine Government to retain import and export duties laid and collected without authority was sustained, where thereafter Congress by retroactive legislation confirmed the unlawful action in collecting the duties. That analogy, however,

fails. As was recently recognized by this Court in *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 339:

> "A tax may be imposed in respect of past benefits so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. . . . But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act."

If we apply that principle Section 611 is invalid.

That section does not purport to lay a tax for the first time. It presupposes that a tax has been laid by appropriate enactment, and has been ascertained and lawfully assessed against the individual taxpayers. If it has any effect as a ratification, it is only in the sense that it provides that moneys illegally collected shall not be refunded under the circumstances specified. Clearly, such ratification is invalid because if Congress had attempted to impose for the first time a tax limited to the special class of taxpayers who are within Section 611, it would have been so arbitrary and capricious as to be unconstitutional, as we shall see below.

In the instant case the tax was collected by the respondent at a time when, by reason of the expiration of the statutory period of limitations, not only the right of collection was barred, but the liability had been extinguished. The petitioners were denied relief by injunction; they could do nothing but pay the amount unlawfully demanded and seek their remedy in the present action. But they had an absolute right to such an action under the common law,—a right to recover a definite sum of money from the respondent personally, that was absolutely due them when Sec-

tion 611 was enacted. No ratification or reimposition of taxes is involved in this case. The sole issue here is whether Congress can take away from petitioners—private parties—their vested right to recover from the respondent a definite sum of money that he had extorted from them without right (*Clinton Iron & Steel Co.* v. *Heiner,* 30 Fed. (2d) 542; *Heiner* v. *Erie Coal & Coke Co.,* 42 Fed. (2d) 214; *Bessemer Coal & Coke Co.* v. *Heiner,* 39 Fed. (2d) 492).

B. The application of Section 611 to the case at bar would unconstitutionally deprive the petitioners of the vested claim which they had against the respondent at the time of its enactment.

A right of action is as much within the protection of the constitutional prohibition as tangible property. *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338. In the case at bar, at the time this suit was brought the petitioners had a vested claim against the respondent and a clear right to recover judgment against him. If Section 611, thereafter enacted, is construed as an attempt to deprive petitioners of that right, it is unconstitutional and void as a deprivation of property without due process of law under the Fifth Amendment. *William Danzer & Co., Inc.* v. *Gulf & Ship Island R. R. Co.,* 268 U. S. 633, and the cases therein cited; *Kansas City Southern Railway* v. *Wolf,* 261 U. S. 133; *Morgan's Louisiana & Texas R. R. & Steamship Co.* v. *Cocke,* 273 U. S. 656; *Peninsula Produce Exchange* v. *New York P. & N. R. R. Co.,* 152 Md. 594, affd. 276 U. S. 599; *United States* v. *John Barth Co.,* 27 Fed. (2d) 782, reversed on other grounds 279 U. S. 370; *Wyman, Partridge & Co.* v. *United States,* 41 Fed. (2d) 886; *Wettengel* v. *Robinson,* 288 Pa. 362; 136 Atl. 673; *Pepsin Syrup*

Co. v. *Schwaner,* 35 Fed. (2d) 197; *Southern Lumber Co.* v. *United States* (U. S. D. C., W. D. Ark., May 6, 1930), C. C. H. 1930 F. T. S., vol. III, D 9519.

C. Section 611, if construed as reimposing the tax or ratifying its collection, is so arbitrary and capricious as to be void under the Fifth Amendment.

This Court has recognized that an act of Congress purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment (*Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142, 276 U. S. 594; *Untermyer* v. *Anderson,* 276 U. S. 440). This is especially true as to the classification of the persons subject to tax (*Schlesinger* v. *Wisconsin,* 270 U. S. 230).

Section 611 in the original form proposed by the House and rejected by the Senate was unfair enough (see the Appendix hereto), but the section in its garbled, compromise form is even more discriminatory.

That the classification attempted in Section 611 is so arbitrary and discriminatory as to amount to confiscation is conclusively demonstrated by the following:

(1) Section 611 neither required nor authorized the collection *after* its enactment of the taxes described therein, and the Commissioner of Internal Revenue accordingly recognized that only voluntary payments made after the effective date of the 1928 Act came within the provisions of that section, and after such date refrained from compelling the payment of barred taxes (Mimeograph No. 3660, Cumulative Bulletin VII-2, p. 82; General Counsel's Memorandum No. 4197, *Id.,* p. 87; *Wettengel* v. *Robinson,* 288 Pa. 362, 136 Atl. 673).

(2) If Section 611 is applied retroactively, this distinction between voluntary and involuntary payments should also be given effect with respect to payments made *before* the enactment of the Revenue Act of 1928. The payments in the case at bar were made under protest and duress.

(3) In cases otherwise coming within Section 611, but in which, when the abatement claims were decided, the taxpayers did not pay the tax, but appealed to the Board of Tax Appeals, they were not denied the benefit of the statute of limitations because under the provisions of Section 906(e) of the Revenue Act of 1926, or of Section 601 of the 1928 Act, if the Board found that collection of the tax was barred by limitations, its finding was considered to be a decision that there was no tax liability. See *Philadelphia Lawn Mower Co.* v. *Commissioner of Internal Revenue,* 16 B. T. A. 435.

(4) Section 611 does not authorize the retention of taxes collected after the statute ran where collection was delayed by claims for credit (*G. C. M. 6296,* Cumulative Bulletin VIII-2, p. 152).

(5) Section 611 does not authorize the retention of taxes collected after the statute ran where collection was delayed by a protest (*G. C. M. 6308,* Cumulative Bulletin VIII-1, p. 132).

(6) As in cases where taxpayers filed credit claims or protests, or requested conferences, so in cases where they filed claims in abatement, without bonds or similar agreements, the Commissioner of Internal Revenue and the collectors were under no obligation, either expressed or implied, to delay collection of the taxes (Regulations 62 and

45, Article 1032; Regulations 33 (Revised), Article 261, par. 743; Regulations 14, Revised).

(7) Taxpayers who filed abatement claims, without bonds or similar agreements, are deprived by Section 611 of the right to recover barred taxes, on the ground that they were collected after the statute ran, whether or not they requested that collection be delayed. In the case at bar the abatement claim was rejected three months before the statutory period of limitations expired.

(8) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statute ran and more than one year after the enactment of the 1928 Act, even though the collection was delayed by an abatement claim.

(9) Section 611 does not authorize collection to be made from those who delayed collection by abatement claims, but who, prior to the 1928 Act, had recovered taxes collected after the statutory period therefor.

(10) Before the enactment of Section 611 taxpayers could not enjoin the forced collection of barred taxes because of their right to sue for and recover the same, and the petitioners were powerless to restrain the forced collection in question in this case.

(11) After the enactment of Section 611, if that provision were construed as requiring or authorizing the collection and retention of the barred taxes therein described, taxpayers, including the petitioners, could have enjoined collection thereof on the ground that, if paid, they could not sue for or recover the same (*Snyder* v. *Marks*, 109 U. S. 189; *Hill* v. *Wallace*, 259 U. S. 44; *Higgins Mfg. Co.* v. *Page*, 20 Fed. (2d) 948).

Those Courts which have held Section 611 to be a fair and reasonable enactment—and therefore a valid one—have based their decisions upon the ground that the collections specified in that section were delayed until after the expiration of the statutory period of limitations *by reason of acts of the taxpayers and in order to afford the taxpayers an opportunity for a hearing before payment.* Section 611, however, reaches only a very small part of the collections which were so delayed. In fact, it excludes all of such collections except those of a very limited class, to wit, where (1) an abatement claim was filed, (2) collection was made prior to enactment of the act, and (3) there was no recovery of the collection before such enactment.

This exception is artificial and without any reasonable basis whatsoever. It takes the property of a relatively small group of taxpayers and does not touch the property of a vastly larger group of taxpayers who are in precisely the same situation. Such a purported classification does not rest on any reasonable distinction and is so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment.

V.

In any event Section 611 does not prevent the recovery of the interest in question in the present case.

The petitioners seek to recover the sum of $7,034.71, which the respondent forced them to pay to him as alleged additional *taxes,* and the sum of $2,004.69, which the respondent forced them to pay to him as *interest* on said alleged additional taxes (Record 4, 12.)

Sections 607 and 611 of the Revenue Act of 1928 in terms apply to taxes and interest, but by reason of an express condition in Section 611 that section is applicable only to such taxes and interest as were "*assessed* prior to June 2, 1924".

The facts stipulated in the case at bar show that said alleged tax in the sum of $7,034.71 was assessed prior to June 2, 1924, but that no assessment was made of any part of the alleged interest of $2,004.69. (Record, pp. 10, 11 and 12.)

It necessarily follows, therefore, without citation or further argument, that Section 611 has no application to petitioners ' ght to recover said interest.

Conclusion.

For the reasons above set forth, it is respectfully submitted that Section 611 should not be construed as applicable to the case at bar, but, if so construed, that it is so arbitrary, capricious and discriminatory as to be in violation of the Fifth Amendment and therefore void.

December 8, 1930.

Respectfully submitted,

HUGH SATTERLEE,
I. HERMAN SHER,
ALBERT S. LISENBY,
Amici Curiae.

WEILL, WOLFF, SATTERLEE & BLAKELY,
Of Counsel.

Appendix.

Section 611 of the Revenue Bill of 1928, as it was passed by the House of Representatives on December 17, 1927, reads as follows:

> "SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.
>
> If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed; then—
>
> (a) the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection; and
>
> (b) a distraint or proceeding in court for the collection of such part may be begun within one year after the enactment of this Act."

The Committee on Ways and Means of the House in its Report No. 2, 70th Congress, stated as follows (p. 34):

> "SEC. 611. COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED.
>
> Prior to the enactment of the Revenue Act of 1924, it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would

have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment."

With respect to the section in its then form the Committee on Federal Taxation of the American Bar Association, in a report on March 31, 1928, which was furnished to the Committee on Finance of the Senate, commented as follows:

"Section 611 is vicious for the following, among other, reasons:

1. It is disingenuous and ambiguous. It infers that a claim in abatement is a request for delay in the collection of a tax. On the contrary, a claim in abatement asks for immediate action, that is, that the Commissioner of Internal Revenue shall immediately cancel or abate a tax which he has previously assessed. Any delay in acting upon the taxpayer's request for this action is the Treasury Department's delay, and not an accommodation to the taxpayer. The clause in the first paragraph of the section 'if the collection of any part thereof was stayed,' must mean stayed either by the claim in abatement or in some other unexplained way. It can scarcely mean the former, because the collection of no tax was ever stayed by a claim in abatement. Regulations 14 of the Treasury Department, embodying instructions concerning the abatement of taxes, expressly prescribes (p. 14):

> 'FILING OF A CLAIM FOR ABATEMENT DOES NOT OPERATE AS A DELAY OF COLLECTION.—The filing of a claim for the abatement of a tax alleged to have been erroneously assessed does not operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if necessary, collect the tax, and leave the taxpayer to his remedy by claim on Form 46.'

2. It is retroactive legislation without parallel, it revives taxes assessed more than six years ago, and it affects chiefly taxes ten years old. Its language would apply to taxes under the Revenue Act of 1913, or even the Civil War statutes, long since barred and forgotten. Although no other recent

statute, nor even in general the pending bill, has purported to allow collection subsequently to six years after assessment, yet in those cases where abatement claims were once filed, no matter when decided, collection might still be made of taxes assessed six or more years ago. Moreover, the great majority of taxes involved in its application are 1917 and 1918 taxes, on which the period of limitation under previous acts ran prior to June 2, 1924. In other words, Congress is asked by the Treasury Department to reopen controversies, barred nearly four years, relating to taxes nine and ten years old. Is there to be no end?

3. It directly reverses the consistent policy of Congress, it savors of bad faith, and it lacks mutuality. Since 1913 Congress has increasingly recognized the wise policy of statutes of limitation, or of peace, or repose, as they are sometimes called. The proposed provision, as stated by the Ways and Means Committee, 'merely (*sic*) withdraws the defense of the statute of limitations'. Congress has given taxpayers the right to believe that defenses once gained would not be taken away. Where limitations have previously been extended, they have excepted periods of limitation already expired. (See Section 278(c) of the Revenue Acts of 1924 and 1926.) Congress has repeatedly refused to let down the bar of the statute of limitations in the case of taxpayers who learned too late, as a result of a decision of the Supreme Court in some other case, that they had overpaid their income taxes for a prior year. It is said that such taxpayers could have protected themselves by seasonably filing claims and suits, if they had been diligent. The same consideration applies with greater force to the Treasury Department, which should know the tax laws.

4. It assumes to legalize and ratify unlawful acts. The Treasury Department, after it knew the statute

of limitations had run, and contrary to the statutes enacted by Congress, has collected by force, or by threat of force, barred taxes. It now asks Congress to ratify its unlawful acts. The plain question is this: Are we going to have a system of tax administration whereby the Treasury Department may defy a statute of limitations imposed by Congress, take the money of the taxpayers unlawfully, and, when told by the Supreme Court to pay it back, obtain the passage of an Act of Congress purporting to destroy the rights of the taxpayers and to authorize the retention of the money exacted?

5. It destroys public confidence and it impairs the rights of third parties. If such a section as this becomes law, no taxpayer can ever in the future rely on a statute of limitations or feel reasonably sure that his tax liability for any year in the past will not be reopened. First taxpayers were told that tax claims would be barred after five years. After the expiration of such period many of them allowed evidence of their transactions to become cold and dissipated and otherwise changed their positions. Now they are told that barred tax claims will be enforced unless they can disprove them. Moreover, many purchases of corporate properties have been made by third persons in reliance on any further tax controversy for prior years have been barred by limitation. It is these third persons who will be largely affected by the proposed provision.

6. It nullifies the decision of the United States Supreme Court in *Bowers* v. *New York & Albany Lighterage Company* and it is based on misapprehension. The Supreme Court interpreted the intent of Congress as embodied in the Revenue Act of 1921. The Treasury Department now wants Congress to mean something else, and to change its mind as of November 23, 1921. The Ways and Means Committee

of the House was led to believe that the Treasury Department was surprised by the Supreme Court's construction of the Revenue Act of 1921. (See Report to accompany H. R. 1 at page 34.) The Treasury Department was aware of the litigation long pending and should have safeguarded itself against the probable outcome.

7. It is of doubtful constitutionality, it is discriminatory, and it will breed litigation. Section 1106(a) of the Revenue Act of 1926 expressly provided that the bar of the statute of limitations extinguished the liability. Can Congress by fiat recreate a tax liability heretofore extinguished? If Congress cannot authorize the collection of unpaid taxes heretofore extinguished by the bar of the statute, it is unfair to those taxpayers from whom collection of barred taxes was made by force to permit the Treasury Department to retain with impunity such unlawful collections. Because of its probable unconstitutionality, its ambiguity, the effect of provisions of other acts, and other questions of law, as well as the knowledge on the part of taxpayers that they have been deprived of rights which they believed secure, the courts will be flooded with litigation."

Section 611 of the House Bill was entirely omitted from the Revenue Bill of 1928 as it was passed by the Senate on May 21, 1928. The Committee on Finance of the Senate in its Report No. 960, 70th Congress, stated as follows (p. 42):

"COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED.

Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the collection delayed by the filing of a claim in abatement, and also prohibits the refund of amounts

paid after the running of the statute of limitations in such cases. Your committee believes that the bar of the statute should be made effective as to both the Government and the taxpayer and recommends that this section be eliminated."

The Conference Committee restored to the Bill part of the original Section 611, such fragment being thus included in the Revenue Act of 1928 as it now stands. The Conference Report (House Report No. 1882, 70th Congress) stated as follows (p. 6):

"Amendment numbered 190:

That the House recede from its disagreement to the amendment of the Senate numbered 190, and agree to the same with an amendment, as follows:

In lieu of the matter proposed to be stricken out by the Senate amendment insert the following:

Sec. 611. Collections stayed by claim in abatement.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

And the Senate agree to the same."

The Managers on the part of the House in a statement appended to the Conference Report explained as follows (p. 22):

"Amendment No. 190: The House bill (sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without a bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded, solely because of the fact that it was paid after the running of the statute, and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in court begun within one year after the enactment of the new law. The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection."

CLERK'S COP

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 519

AMERICAN GLUE COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1930

CERTIORARI GRANTED NOVEMBER 24, 1930

(35,441)

(35,441)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 519

AMERICAN GLUE COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1929.

No. 2497.

AMERICAN GLUE COMPANY,
PETITIONER, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 3510, LAW DOCKET.

AMERICAN GLUE COMPANY, PETITIONER,
v.
UNITED STATES OF AMERICA.

The petition in this cause was filed in the clerk's office on the fifteenth day of January, A. D. 1929, and was duly entered at the December Term of this court, A. D. 1928, and is as follows:

PETITION.

[Filed January 15, 1929.]

Now comes the American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and having a usual place of business in Boston in said Commonwealth, and respectfully petitions as follows:

1. The petitioner duly filed in the year 1918 its income and excess profits tax returns for its fiscal year 1917, being the calendar year 1917, as required by the Revenue Act of 1916 as amended and by the Revenue Act of 1917, and the regulations of the Com-

missioner of Internal Revenue approved by the Secretary of the Treasury made thereunder, and in said year 1918 paid the income and excess profits taxes shown by such returns to be due from it, to wit, the sum of $514,311.62. (Said excess profits tax return was a consolidated return for the petitioner and affiliated corporations, and the taxes paid by said petitioner included its share of the excess profits taxes of the affiliated group as shown on such return.)

2. In the year 1920 the Commissioner of Internal Revenue assessed upon the petitioner additional income and excess profits taxes for said year 1917 amounting to $173,674.61. (The aggregate additional income and excess profits tax assessed upon the affiliated group was $184,212.83, and said amount of $173,674.61 included the share of the additional excess profits tax assessed upon the affiliated group allocated to the petitioner and the additional income tax assessed upon the petitioner.)

3. Thereafter, on November 6, 1920 the Collector of Internal Revenue for the District of Massachusetts made demand upon the petitioner for the sum of $173,674.61 assessed as aforesaid, and on November 16, 1920, the petitioner paid to said Collector the sum of $2,450.80 and declined to pay the remainder of said sum of $173,674.61, to wit, the sum of $171,223.81.

4. On or about September 2, 1925 the Collector of Internal Revenue for the District of Massachusetts, by his deputy collector George W. B. Britt, issued to John Christoforo, division chief deputy collector, a warrant for distraint directing him to levy upon the property of the petitioner to collect said taxes and the interest thereon and on November 24, 1925 said John Christoforo, division chief deputy collector, served said warrant on the Atlantic National Bank of Boston, Massachusetts, and levied upon the petitioner's money on deposit with said bank and by force of said warrant and levy thereunder collected said taxes amounting to $171,223.81 and interest thereon amounting to $62,040.08. The Collector of Internal Revenue by whom such tax and interest was collected is not now in office as Collector of Internal Revenue.

5. On or about December 31, 1925 the petitioner duly filed with

the Commissioner of Internal Revenue a claim for refund for $233,263.89, or such greater amount as is legally refundable, and interest thereon from November 24, 1925, on the ground among others that the collection of said taxes and interest by force of said warrant for distraint and levy thereunder was illegal and wrongful for the reason that such collection was made by a "proceeding" within the meaning of Section 250, subdivision (d) of the Revenue Act of 1921, which is applicable to the taxes in question, and that such "proceeding" was begun after the expiration of five years after the date when the petitioner's returns were filed as aforesaid.

6. More than six months has expired from the date of filing such claim for refund, to wit, December 31, 1925, and on or about October 9, 1926 said Commissioner of Internal Revenue disallowed said claim for refund.

7. The period of five years after the date when the petitioner's returns were filed as aforesaid expired during the year 1923. The petitioner never has waived the Statute of Limitations on the collection of said taxes and interest. No suit or proceeding for the collection from the petitioner of the taxes in question (or any interest thereon) was begun prior to the expiration of said five years.

8. The petitioner claims that the collection of said taxes and interest by force of said warrant for distraint and levy thereunder was illegal and wrongful for the reason that such collection was made by a "proceeding" within the meaning of Section 250, subdivision (d) of the Revenue Act of 1921, which is applicable to the taxes in question, and that such "proceeding" was begun after the expiration of five years after the date when the petitioner's returns were filed as aforesaid.

9. Wherefore the United States owes the petitioner the sum of $233,263.89, together with interest thereon.

10. No other action has been had on said claim in Congress or in any of the departments; no other action on said claim is pending in any court; no person other than the petitioner is the owner thereof or interested therein and no assignment or transfer of this claim or any part thereof or of interest therein has been made. The petitioner is justly entitled to the amount herein claimed from

the United States after the allowing of just credits and offsets. The petitioner at all times has borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

Wherefore the petitioner prays judgment against the United States of America upon the facts and law for the sum of $233,263.89 with interest thereon from November 24, 1925 and its costs and disbursements.

AMERICAN GLUE COMPANY,
by ROBERT W. YOUNG, *Treasurer.*

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, SS. JANUARY 14, 1929.

Then personally appeared Robert W. Young, treasurer of American Glue Company, and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

ROGER UPTON,
[SEAL] *Notary Public.*

At the same term, to wit, February 20, 1929, the following Answer was filed:

ANSWER.

[Filed February 20, 1929.]

Now comes the defendant in the above-entitled action and for its answer to the petition,

1. Admits each and every allegation in paragraphs 1, 2, 3, 4, 5 and 6 of the petition.

2. The defendant admits the allegations contained in paragraph 7 of the petition, except the allegation that the petitioner never has waived the statute of limitations in the collection of the tax and interest, which allegation the defendant denies.

3. The defendant denies each and every allegation in paragraph 8 of the petition.

And further answering the allegations in paragraph 8 of the petition the defendant says that on November 15, 1920 the petitioner filed a claim in abatement for the amount of $171,223.81

which stayed the collection of the tax within the meaning of Section 611 of the Revenue Act of 1928, and that by reason thereof the payment of the tax more than five years after the petitioner's return was filed did not constitute an overpayment within the meaning of Section 607 of the Revenue Act of 1928.

4. The defendant denies each and every allegation in paragraph 9 of the petition.

5. The defendant admits the allegations in paragraph 10 of the petition except the allegation that the petitioner is justly entitled to the amount herein claimed from the United States after the allowing of just credits and offsets, which allegation the defendant denies.

By its Attorneys,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued from term to term to the September Term, A. D. 1929, when to wit, October 15, 1929, an agreed statement of facts was filed.

Said cause was thence continued to the December Term, A. D. 1929, when, to wit, December 23, 1929, the following Substituted Agreed Statement of Facts was filed:

SUBSTITUTED AGREED STATEMENT OF FACTS.

[Filed December 28, 1929.]

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. On or about May 1, 1918 the petitioner, American Glue Company, duly filed its income and excess profits tax returns for its fiscal year 1917, being the calendar year 1917, as required by

the Revenue Act of 1916, as amended and by the Revenue Act of 1917, and the regulations of the Commissioner of Internal Revenue approved by the secretary of the treasury made thereunder, and in said year 1918 paid the income and excess profits taxes shown by such returns to be due from it, to wit, the sum of $514,311.62. (Said excess profits tax return was a consolidated return for the petitioner and affiliated corporations and the taxes paid by said petitioner included its share of the excess profits taxes of the affiliated group as shown on such return.)

2. During September, 1920, the Commissioner of Internal Revenue assessed against the petitioner, American Glue Company, additional income and excess profits taxes for the said year 1917 amounting to $173,674.61. (The aggregate additional income and excess profits tax assessed against the affiliated group was $184,212.83, and said amount of $173,674.61 included the share of the additional excess profits tax assessed against the affiliated group allocated to the petitioner and the additional income tax assessed upon the petitioner.)

3. Thereafter, on November 6, 1920, the Collector of Internal Revenue for the District of Massachusetts made demand upon the petitioner for the sum of $173,674.61 assessed as aforesaid, and on November 16, 1920 the petitioner paid to said Collector the sum of $2,450.80 and declined to pay the remainder of said sum of $173,674.61, to wit, the sum of $171,223.81, and filed a claim in abatement for said amount of $171,223.81 on November 15, 1920. The plaintiff submitted additional evidence and arguments in support of its contentions with respect to the merits of the assessment. Bureau-letter dated August 18, 1924 (a copy of which is hereto attached as "Exhibit A" and made a part hereof) was mailed by registered mail from the office of the Commissioner of Internal Revenue and was received by the petitioner in due course of mail.

4. On or about September 22, 1925 the Collector of Internal Revenue for the District of Massachusetts, by his deputy collector, George W. B. Britt, issued to John Christoforo, division chief deputy collector, a warrant for distraint directing him to levy upon the

property of the petitioner to collect said taxes and the interest thereon, and on November 24, 1925 said John Christoforo, division chief deputy collector, served said warrant on the Atlantic National Bank of Boston, Massachusetts, and levied upon the petitioner's money on deposit with said bank and by force of said warrant and levy thereunder collected said taxes amounting to $171,223.81, and interest thereon amounting to $62,040.08. The Collector of Internal Revenue by whom such tax and interest were collected is not now in office as Collector of Internal Revenue.

5. The amount of $171,223.81, together with interest thereon, amounting to $62,040.08, levied upon and collected as set forth above was transferred by the Collector of Internal Revenue to the treasury of the United States.

6. On December 31, 1925 the petitioner duly filed with the Commissioner of Internal Revenue a claim for refund for $233,263.89, or such greater amount as is legally refundable, based upon the ground that the collection of this tax and interest was illegal and wrongful, because made more than five years from the date the return was filed. A true copy of that portion of said claim for refund relating to the collection of said tax is hereto attached and marked "Exhibit B".

7. More than six months has expired from the date of filing such claim for refund, to wit, December 31, 1925, and on or about October 16, 1926 said Commissioner of Internal Revenue rejected said claim for refund.

8. No other action has been had on said claim in Congress or in any of the departments; no other action on said claim is pending in any court; no person other than the petitioner is the owner thereof or interested therein, and no assignment or transfer of this claim or any part thereof or of interest therein has been made. The petitioner at all times has borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

9. Is it hereby agreed that the agreed statement of facts hereto filed on the fifteenth day of October, 1929, be and the same is

hereby withdrawn and that the foregoing substitute agreed statement of facts is filed in place and in lieu thereof.

It is further agreed and stipulated that the agreed statement of facts filed on the fifteenth day of October, 1929 shall not constitute a part of the record in this case.

ROBERT E. GOODWIN,
HARRIS L. GILMAN,
Counsel for the Petitioner.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistent to the United States Attorney,
Counsel for Defendant.

EXHIBIT A.

Copy Registered August 18, 1924

IT:CR:A JHA

American Glue Company, 121 Beverly Street, Boston, Massachusetts.

Sirs: Your claim for the abatement of $171,223.81, a part of the income and excess profits tax for the year 1917, has been examined and is hereby rejected for the reason that an audit of your returns for the year in question discloses a tax liability in excess of the amount previously assessed.

In the determination of this correct tax liability, due consideration has been given the statements made in your claim.

The basis of the additional assessment has been made the subject of a previous communication from this Bureau.

The Collector of Internal Revenue for your district will be officially notified not later than thirty days from the date of this letter of the rejection of the above amount.

Respectfully,

J. G. BRIGHT Deputy Commissioner
by L. T. Lohmann Head of Division.

EXHIBIT B.

(Execute Separate Form for Each Tax Period)

Claim for Refund of Taxes Illegally Collected

State of Massachusetts

County of Suffolk ss:

(Name of taxpayer or purchaser of stamps.) American Glue Company

(Business address.) 121 Beverly Street, Boston, Massachusetts

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period from Jan. 1 year 1917 to Dec. 31, year 1917

1. Business in which engaged Manufacture and sale of glue and other products
2. Character of assessment or tax Income and excess profits taxes (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased $750,026.31
4. Reduction of Tax Liability requested (Income and Profits Tax) 233,263.89*
5. Amount to be abated 000
6. Amount to be refunded (or such greater amount as is legally refundable) 233,263.89
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) See below **

(If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed Massachusetts
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit 000
11. Unpaid assessment against which credit is asked; period from to 000

Deponent verily believes that this application should be allowed for the following reasons: (See attached sheets)

*(Reduction of tax liability requested includes additional assessment 1920—tax, $171,223.81, interest $62,040.08—Total $233,263.89.

** Dates of payment were 1918 $514,311.62
November 16, 1920 2,450.80
November 24, 1925
(Collected by distraint) 233,263.89

Total $750,026.31

AMERICAN GLUE COMPANY
By J. P. Lyman, President

Sworn to and subscribed before me this 30th day of December, 1925
Roger Upton, Notary Public

I.

Illegal Collection

The collection by distraint of the taxes and interest in question was illegal and wrongful, irrespective of the validity of the assessment, and such taxes and interest, with interest thereon from the date of collection thereof (November 24, 1925), should be refunded.

The claimant duly filed its income and excess profits tax returns for the fiscal (calendar) year 1917 as required by law and regulations in the year 1918 and paid the income and excess profits taxes shown by such returns to be due to it, to wit, the sum of $514,311.62. (Said excess profits tax return was a consolidated return for the claimant and affiliated corporations and the taxes paid by said claimant included its share of the excess profits taxes of the affiliated group as shown on such return.)

In the year 1920 the Commissioner of Internal Revenue assessed upon the claimant additional income and excess profits taxes for said year 1917 amounting to $173,674.61. (The aggregate additional income and excess profits tax assessed upon the affiliated group was $184,212.83 and said amount of $173,674.61 included the share of the additional excess profits tax assessed upon the affiliated group allocated to the claimant and the additional income tax assessed upon the claimant.)

Thereafter, on November 6, 1920, the Collector of Internal Revenue for the District of Massachusetts made demand upon the claimant for the sum of $173,674.61 assessed as aforesaid and on November 16, 1920 the claimant paid to said Collector the sum of $2,450.80 and duly filed with the Commissioner of Internal Revenue a *bona fide* claim for abatement in the form and manner prescribed by the law and regulations for the remainder of said sum of $173,674.61, to wit, the sum of $171,223.81.

Said claim for abatement is still pending before the Commissioner of Internal Revenue.

The Revenue Act of 1921, Section 250, subdivision (d), which is applicable to the taxes in question, provides that " no suit or proceeding for the collection of any such taxes under this Act or under prior income and excess profits or war profits tax Acts . . . shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act ", with certain exceptions which are not here applicable.

The period of five years after the date when the claimant's returns were filed as aforesaid expired during the year 1923.

No suit or proceeding for the collection of the taxes in question (or any interest thereon) was begun prior to the expiration of said five years.

On or about September 2, 1925 the Deputy Collector of Internal Revenue in charge for the District of Massachusetts issued to John Christoforo, division chief deputy collector, a warrant for distraint directing him to levy upon the property of the claimant to collect said taxes and the interest thereon and on November 24, 1925 said John Christoforo, division chief deputy collector, served said warrant on the Atlantic National Bank of Boston, Massachusetts, and levied upon the claimant's money on deposit with said bank and by force of said warrant and levy thereunder collected said taxes and interest thereon to the aggregate amount of $233,263.89.

The claimant has never waived the statutory limitation upon the collection of said taxes and interest.

The claimant contends that the collection of said taxes and interest by force of said warrant for distraint and levy thereunder was illegal and wrongful for the reason that said collection was by a proceeding within the meaning of said Section 250, subdivision (d) of the Revenue Act of 1921, and such proceeding was begun after the expiration of five years after the date when the claimant's returns were filed.

At the same term, to wit, January 31, 1930, said cause came on to be heard without jury on the aforementioned substituted agreed statement of facts, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence continued under advisement from term to term to the present June Term, A. D. 1926, when, to wit, June 26, 1930, an opinion of the court is announced, judgment to be entered for the defendant.

On the twenty-ninth day of July, A. D. 1930 a draft bill of exceptions is filed by the petitioner within extended time.

On the twenty-seventh day of August, A. D. 1930, a substituted bill of exceptions is filed and assented to, said substituted bill of exceptions having been allowed by the court, on the twenty-sixth day of said August.

Thereupon, to wit, September 8, 1930, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that judgment be entered on the finding of the court for the United States, defendant, and for its costs of suit taxed at

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PETITIONER'S SUBSTITUTE BILL OF EXCEPTIONS.

[Filed August 27, 1930; Allowed August 26, 1930.]

This is a petition by American Glue Company filed on January 15, 1929, against the United States of America, seeking to recover income and excess profits taxes for the calendar year 1917 in the amount of $233,263.89 and interest alleged to have been illegally collected by seizure of the petitioner's property on November 24, 1925, under a warrant of distraint issued by the Collector of Internal Revenue at Boston, Massachusetts (hereinafter referred to as

the "Collector"). The pleadings are a part of this record and may be referred to as a part of this bill of exceptions.

All requisite conditions precedent to the bringing of this petition were complied with by the petitioner.

The case was tried on January 31, 1930, before Brewster, J. without a jury upon a substitute agreed statement of facts and additional oral testimony. The substitute agreed statement of facts is by reference incorporated into and made a part of this bill of exceptions.

The oral testimony introduced at the trial was, so far as material to these exceptions, to the following effect:

The petitioner's claim for abatement of the tax in question was filed with the Collector at Boston in the District of Massachusetts under date of November 15, 1920. The practice of the Collector's office upon receiving such a claim for abatement was to stamp said claim with the date of receipt and to make a card record which contained complete information as to the amount of the claim, the year for which filed, the name and address of the taxpayer, the date of filing, and the date on which the claim was forwarded to the office of the Commissioner of Internal Revenue at Washington, D. C. (hereinafter referred to as the "Commissioner"). According to such practice the record of the claim was also noted on the taxpayer's account, kept at the Collector's office, before the claim was sent to the Commissioner. A copy of the Collector's card record in the instant case is hereto attached and marked "A".

It was not the custom of the office of the Collector to read over claims in abatement sent to the Commissioner, and the particular claim for abatement in question was merely recorded, noted on the Collector's record card and sent to the Commissioner. The representative of the Collector of Internal Revenue did not read the claim in abatement which was filed in this case and knew nothing of the representations contained therein other than the amount of the claim.

A notice from the Commissioner to the effect that the petitioner's claim in abatement had been rejected was received by the

Collector on April 14, 1921 and then later, on May 11, 1921, a further notice was received by the Collector from the Commissioner, and entry thereof made on the records of the Collector, that such rejection was in error. After the notice and demand of October 25, 1923 was mailed to the plaintiff, the Collector received word from the Commissioner that the plaintiff's claim for abatement was still being considered. According to the records of the Collector, his office was never advised that the claim in abatement was ever finally rejected.

The Collector issued and served upon the petitioner notices and demands for the payment of the tax in question on the following dates, viz: November 6, 1920, April 29, 1921, and October 25, 1923. It was not customary in the Boston Collector's office to send out such notices of demand where the claim in abatement had not been fully acted upon and if the collection of the tax was not jeopardized.

Whether or not collection should be pressed by the Collector was entirely within the discretion of the Collector and he could have collected the tax in question at any time. The Collector and his subordinates were familiar with the provisions of Treasury Regulations 62, Article 1032, and similar regulations as follows:

> "Art. 1032. Claims for abatement of taxes erroneously assessed. . . . The filing for a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

It was the usual practice of the Collector and his subordinates not to issue warrants for distraint in cases where claims in abatement had been filed and were pending. A member of the staff of the office of the Collector testified that, as far as he knew, the office of the Collector in Boston never brought any suits at law to collect a tax while a claim in abatement was pending.

In this case there was a withholding of the collection of the tax

and administrative delay with respect to the collection thereof up to November 24, 1925, the date of the seizure by distraint. The court found that there was a claim in abatement and delay of collection as a consequence of the claim. During this period the petitioner was actively engaged in contesting the merits of the assessment and evidence was introduced by the respondent that during this period the petitioner requested the withholding of the collection of the tax, pending the determination of the merits of the assessment. Such evidence consisted of correspondence and a restricted assessment waiver dated subsequent to April 30, 1923, the date of the expiration of the period of limitation. All such evidence which referred to activities of the petitioner subsequent to April 30, 1923, the date of expiration of the period of limitation, was objected to by the petitioner and exception taken to the admission thereof. A copy of said restricted assessment waiver is hereto attached marked "B" and made a part hereof. The respondent did not assess any additional tax upon the petitioner subsequent to the date of the filing of the restricted waiver and never made any assessment upon the petitioner in reliance thereon or pursuant thereto.

Among the said correspondence was a letter dated November 3, 1923 from the petitioner to the Collector, the admission of which in evidence was objected to by the petitioner and exception taken thereto. A copy of said letter is hereto attached marked "C".

The respondent offered in evidence the claim in abatement filed by the petitioner on November 15, 1920. A substantial extract from this claim is hereto attached marked "D", but said exhibit does not include the contentions and schedules of the petitioner relating to the merits of its contentions, such portions of said claim being immaterial to the issues raised on this record.

Members of the staff of the office of the Collector testified that the tax in question was not collected prior to the date of the seizure by distraint because the petitioner's claim for abatement was pending. The same witnesses also testified that if the Collector or his subordinates had supposed or understood that the statute

of limitations contained in Section 250 (d) of the Revenue Act of 1921 applied to proceedings by distraint, collection would have been made notwithstanding the pendency of the claim in abatement; that at the time when the Collector made this distraint (about two years and six months after the five year period of limitation had expired) he was led to do so because of the decision of the United States District Court for the Southern District of New York in the case of New York & Albany Lighterage Company *v.* Bowers, holding that distraint was a "proceeding" within the meaning of the term as used in Section 250 (d) of the Revenue Act of 1921, and that one of the reasons, but not the main reason, why the Collector had not undertaken to distrain up to that time was because he believed that distraint proceedings could be instituted and enforced at any time. According to the decision in the case above referred to, the collection of the tax in the instant case was barred.

Soon after the United States District Court for the Southern District of New York had ruled, in the case of *New York & Albany Lighterage Company* v. *Bowers*, that distraint was a "proceeding" and was barred by the said statute of limitations, the Collector proceeded to enforce collection of taxes, including the tax in question.

It was admitted at the trial by counsel for the United States that there was no legal stay in this case which prevented the Collector from collecting the tax at any time. The collection of said tax from the petitioner was barred by the statute of limitations at the time the collection was made.

The foregoing constitute all the facts material to the issues raised by this record.

At the trial of the case the petitioner requested the court to make certain rulings on matters of law, of which the following were denied, viz:

1. The seizure, under warrant for distraint, of the sum of $233,263.89 from the petitioner on November 24, 1925, by the Collector of Internal Revenue for the District of Massachusetts, was illegal and the petitioner may recover from

the United States of America said sum of $233,263.89 with interest thereon from the date of seizure in accordance with the provisions of Revised Statutes 3226 as amended by Section 1111 of the Revenue Act of 1926.

2. The sole purpose and effect of Section 607 of the Revenue Act of 1928 was to enlarge the class of taxpayers who were entitled to sue and recover under the provisions of Section 3226 of the Revised Statutes as amended.

3. Section 607 of the Revenue Act of 1928 did not limit, take away, or in any way affect any right of action which the petitioner had at the date of its enactment.

4. Section 611 of the Revenue Act of 1928 did not take away any right of action which the petitioner had at the date of its enactment.

5. Section 611 of the Revenue Act of 1928 did not by express terms or by implication do more than limit the scope and effect of Section 607 of the Revenue Act of 1928 and did not of itself grant any rights or privileges whatsoever.

6. The illegal seizure of said sum of $233,263.89 in 1925 by the Collector of Internal Revenue did not effect a payment or satisfaction of the petitioner's tax liability (if any liability then existed) since said seizure was illegal and said tax liability (if any) remained (even though the respondent's remedy to enforce collection had become barred) until the enactment of Section 1106 of the Revenue Act of 1926, by which last named enactment such liability, if any, became extinguished and was not recreated or revived by the enactment of Section 612 of the Revenue Act of 1928.

7. The collection of the additional tax assessed against the petitioner in September 1920 was never "stayed" within the meaning of the word as used in Section 611 of the Revenue Act of 1928.

At the trial of the case the respondent requested the court to make certain rulings on matters of law, of which the following were made by the court, viz:

(a) That the withholding, delaying and postponement of collection by the Collector in this case, because of the filing of the claim for abatement, was a stay of collection within the meaning of Section 611 of the Revenue Act of 1928.

(b) That the provisions of Section 611 of the Revenue Act of 1928 apply to the facts of this case and furnish a complete defense to this suit.

(c) That the petitioner is not entitled to recover in this action.

The court, in an opinion handed down on the twenty-sixth day of June, 1930, made the following rulings in matters of law:

(1) That judgment should be entered for the respondent.

(2) That Section 611 of the Revenue Act of 1928 defeats the petitioner's right to recover in these proceedings.

(3) That the construction put upon Section 611 of the Revenue Act of 1928 by Judge Dawson in *Wright & Taylor, Inc.*, v. *Lucas*, by Judge Mack in *Regla Coal Co.* v. *Bowers*, and by Judge Deitrich in *Huntley* v. *Giles* is the correct construction and the one necessary to give effect to the intent and purpose of the legislation of 1928 as revealed in Congressional documents.

(4) That resort may properly be had to reports of legislative committees for the purpose of ascertaining the occasion and necessity for the enactment of Section 607 and Section 611 of the Revenue Act of 1928, the situation confronting Congress under the earlier laws and the proposed remedy of the new law.

(5) That Section 607 of the Revenue Act of 1928 created no substantive rights which the taxpayer did not already enjoy except to have his claim recognized by those charged with the administration of the Revenue Laws.

(6) That if Section 611 of the Revenue Act of 1928 does not affect a taxpayer's right to recover by suit taxes collected after the five year period, then the whole scheme of the legislation fails in its announced purpose to limit refunds of taxes

paid or collected, after the right to collect had been barred, to those cases where there had been no claim in abatement and no stay of proceedings to collect.

(7) That the right of the petitioner to reclaim taxes illegally collected was withdrawn by the provisions of Section 611 of the Revenue Act of 1928.

(8) That Congress, by Section 611 of the Revenue Act of 1928, undertook to withdraw from a taxpayer the right to reclaim taxes (otherwise rightfully due) which had previously been held recoverable solely on the ground that they had been paid or collected after the statute had run against the collection.

(9) That the word "stayed" as used in Section 611 of the Revenue Act of 1928 should be taken as synonymous with "delayed" and if there was a voluntary or involuntary delay, following upon or occasioned by a claim in abatement, the collection was stayed.

(10) That a claim for abatement having been filed, there was a stay of the collection of the tax as a consequence of such claim for abatement.

(11) That payments under protest when a taxpayer is threatened with a warrant of distraint should be given the same legal effect as a collection by distraint.

(12) That there can be no justification in law for exempting from the operation of Section 611 of the Revenue Act of 1928 taxpayers who, instead of avoiding threatened distraint by payment, allowed the warrant of distraint to be executed.

The court admitted in evidence at the trial of the case the following documents over the objection of the petitioner and subject to its exception, viz:

(a) Restricted waiver of assessment of taxes dated December 15, 1923.

(b) Certain correspondence between the petitioner and the Commissioner and the Collector which was sent and received after the period of limitation had expired.

The petitioner being aggrieved,

(1) by the refusal of the Court to grant the aforesaid rulings of law requested by the petitioner, and

(2) by the granting of the respondent's aforesaid requests for rulings, and

(3) by the aforesaid findings and rulings of the Court, and

(4) by the admission of the aforesaid evidence objected to by the petitioner, now excepts to the refusal to grant the petitioner's said requests and to the granting of the respondent's said requests and to the findings and rulings on matters of law and the admission of evidence above referred to, and therefore brings this its bill of exceptions, and prays that it may be allowed.

By its Attorneys,

ROBERT E. GOODWIN,
HARRIS H. GILMAN.

Assented to.

FREDERICK H. TARR, *United States Attorney,*
by J. DUKE SMITH,
Special Assistant to United States Attorney,
Attorneys for Respondent.

August 26, 1930, allowed by

JAMES A. LOWELL,
United States District Judge.

EXHIBIT A.

Copy [Face of Card:]

FMR No. 9726 Assessed $173,674.61
Claimed 171,223.81

American Glue Co., 121 Beverly Street, Boston.
Assess. list: 1754447: Sept. 1920 addl. p. 21 1 2 47 filed 11/15/20
Kind of tax: Addl Inc and Prof 1917.
Posted F. E. B. 12-23-20 Fwd 1-11-21
Checked by S. C. E. E. E. S.
Attached: Three forms 47, brief in support of claims and letter. from Tp.

Remarks: See brief attached.

4-14-21 Rejected 171,223.81 DI-IT-SA-CR-A TFC
Original given to Miss Collins. 4-23-21 CEQ.

[Reverse side of Card:]

5-11-21 D. L.—IT-SA-CR-JWM—Advising Rej. In Error—
Orig. Given To Miss Collins 7-6-21 HVC

11-6-23: Bureau telegram 11/5 rec'd advising claim being considered. JHR. List noted.

Acct. closed by payment 11/25/25.

EXHIBIT B.

IT:SA:CR WAIVER

American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917 on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability covering items not already assessed may be entered; provided, however, that this waiver is upon the express conditions and subject to the limitations that the total assessment of income and profits taxes on said company for the said year shall not exceed the amount assessed and remaining unpaid on October 30, 1922. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against it for said year by the officials of the Income Tax Unit.

AMERICAN GLUE COMPANY,
By Jesse P. Lyman
(Corporate Seal) President and Treasurer duly authorized.

(Copy of Accompanying Letter)

Luther F. Speer Counselor on Federal Taxation
Munsey Building

Washington, D. C., December 15, 1923.

Commissioner of Internal Revenue, Washington, D. C.

Re: American Glue Company, IT:SA:CR.

Sir: There is submitted herewith waiver covering the year 1917, duly executed by the taxpayer named above and it is respectfully requested that no assessment be made in this case without the taxpayer being granted the benefits of section 250 (d) of the Revenue Act of 1921.

It is respectfully requested that receipt of this waiver be acknowledged by the Bureau of Internal Revenue.

Respectfully,

LUTHER F. SPEER
Attorney for American Glue Company.

Encl.

EXHIBIT C.

Copy

American Glue Company
Office, 121 Beverly Street, Boston, U. S. A.

Office of the Clerk November 3, 1923.

Collector of Internal Revenue, Little Building, Boston, Massachusetts

Dear Sir: We have your letters of October 24, 1923 and second notice and demand for taxes, addressed to the following companies:

American Glue Company, additional tax	$240,740.68
N. Ward Company	6,190.40
John C. Dow Company	7,738.66

Immediately upon receipt of the above letters and demand for taxes we took up the matter with the tax authorities in Washington and the chief of the Consolidated Section of the Income Tax Unit has promised to reopen the case and telegraph you to this effect.

We have had pending with the tax authorities for two or three years claims for abatement and adjustment of our taxes and no agreement has as yet been reached. We have waited since February, 1923, for some advice from the authorities in Washington with regard to a further hearing or discussion of the items in dispute and your letter of October 24th with a demand notice for additional taxes was the first we have heard from the matter since last February.

At our conference in Washington on October 29th, it was agreed that the assessment notice above mentioned should be recalled and the case reopened for further hearings and discussions and that it was not necessary for us to pay any additional taxes at this time.

This letter is principally for the purpose of insuring that you are acquainted with the situation and, in case you have not received the notice from the authorities in Washington, please let us know promptly as we do not wish to be in the position of not paying proper attention to your letters of October 24th, and notice and demand for taxes.

Yours very truly,

AMERICAN GLUE COMPANY,

JPL : S

J. P. Lyman, Treasurer.

EXHIBIT D.

CLAIM FOR ABATEMENT

Taxes Erroneously or Illegally Assessed

State of Massachusetts

County of Suffolk ss:

American Glue Company 121 Beverly Street, Boston, Massachusetts

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant Manufacturers of Glue, Gelatine, Abrasive Papers and Cloths (Parent Company)

2. Character of assessment or tax Additional Income Profits Tax for 1917.

3. Amount of assessment $173,674.61

4. Amount now asked to be abated . . $171,223.81

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

AMERICAN GLUE COMPANY

By Jesse P. Lyman Treasurer.

Sworn to and subscribed before me this 15th day of November, 1920

Roger Upton,

[SEAL] Notary Public.

(1) A brief has been filed by the claimant with the Department of Internal Revenue at Washington, copy of which is hereto attached and made a part of this affidavit, setting forth the reasons why the principal part of this additional tax should not be assessed. On September 16, 1920 a conference was held between the claimant and the Internal Revenue authorities at Washington, at which it was arranged that the claimant should submit additional information to the Department and that in the meanwhile no action would be taken by the Department toward the collection of the additional tax. The claimant is now preparing this additional information, supplementing the reasons contained in the brief hereto annexed and covering the matters not therein contained. The claimant will file a copy of this additional information supplementing this affidavit as soon as it is prepared, and in the meantime requests that it be treated as a part of this claim for abatement.

(2) In a letter to the claimant from G. V. Newton, Deputy Commissioner of Internal Revenue, dated July 12, 1920, it is stated that an additional tax of $5,017.98 has been found to be due from the claimant for the year 1916, and, as the statutory limitation of time allowed for additional assessment had expired, the claimant was requested to waive its right not to be assessed this additional tax. The claimant does not here contest the amount of this addi-

tional tax. The claimant does not here contest the amount of this additional tax, for 1916, and proposes to waive its right not to be assessed. The additional tax is the result of the disallowance of certain deductions amounting to $250,899.46 made by the claimant in its return for the year 1916. As a result claimant's net income for the year 1916 is increased by $250,899.46. This additional income for the year 1916 was not included by the claimant in estimating its consolidated invested capital for the year 1917, nor has any credit for this amount been given to the claimant by the Department of Internal Revenue in re-estimating its consolidated invested capital for the year 1917 on the basis of which additional taxes have been assessed to the claimant and its subsidiary companies. The claimant now alleges that on the Government's computation it is entitled to this addition of $250,899.46, to its consolidated invested capital for the year 1917.

OPINION.

June 26, 1930.

BREWSTER, J. In its petition the American Glue Company seeks to recover accrued income and excess profits taxes for the year 1917 in the amount of $223,263.89, which was collected on a warrant of distraint after the period of limitation established by the Revenue Act of 1921 (Sec. 250 (d)) had expired.

A schedule of important dates follows:

1917 tax return filed,	May 1, 1918
Additional assessment ($173,674.61),	Sept. 1920
Notice and demand for payment,	Nov. 6, 1920
Claim for abatement of $171,223.81,	Nov. 15, 1920
Second notice and demand for payment,	April 29, 1921
Five-year period from date of filing return expired,	April 30, 1923
Third notice and demand for payment,	Oct. 25, 1923
Claim for abatement rejected,	Aug. 18, 1924
Property seized under warrant for distraint ($223,263.89),	Nov. 24, 1925
Claim for refund filed,	Dec. 31, 1925
Claim for refund denied,	Oct. 16, 1926
Suit commenced,	Jan. 15, 1929

It is not denied that when the taxes were collected the rights of the United States were barred by the limitation of the statute and that prior to the enactment of the Revenue Act of 1928 (May 29, 1928) the petitioner's right to recover could not have been questioned.

Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346.

It is, however, the contention of the defendant that this right of recovery was taken away by sections 607 and 611 of the Act of 1928. These sections provide:

Sec. 607— Effect of Expiration of Period of Limitation against United States

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an 'overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim'."

Sec. 611—Collections Stayed by Claim in Abatement.

" If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

The question presented is whether these sections operated to deprive the petitioner of its right to recover taxes collected at a time when the collection was illegal and wholly without warrant of law. The question is not novel. All the arguments pro and con offered by the parties have been submitted to, and considered

by, the Federal courts in a number of cases. Unfortunately the courts are not in accord respecting the interpretation and application of the provisions of these sections. The law is still unsettled respecting the rights of a taxpayer who filed a claim for abatement of a tax seasonably assessed prior to June 2, 1924, and which was collected prior to the enactment of the Act of 1928. There is no controlling decision in point in this circuit. I have, therefore, carefully examined irreconcilable opinions in other jurisdictions and, as a result, have reached the conclusion that the construction put upon section 611 by Judge Dawson in *Wright & Taylor, Inc.* v. *Lucas* (34 F. (2d) 328), by Judge Mack in *Regla Coal Co.* v. *Bowers* (37 F. (2d) 373) and Judge Dietrich in *Huntley* v. *Gile* (32 F. (2d) 857, is the correct construction and the one necessary to give effect to the intent and purpose of the legislation of 1928, as revealed in congressional documents. I concur with these judges in the belief that resort may properly be had to reports of legislative committees for the purpose of ascertaining the occasion and necessity for the enactment, the situation confronting the Congress under the earlier laws and the proposed remedy of the new law.

Park Amusement Co. v. *MacCaughn*, 14 F. (2d) 553.

As these congressional reports are fully stated in other opinions cited (see *Huntley* v. *Gile, supra; Wright & Taylor, Inc.* v. *Lucas, supra*), there is no need for repetition here. The purpose of the legislation is apparent. It was to authorize administrative officials to credit or refund, as an overpayment, taxes paid after the expiration of the statutory period of limitation applicable thereto, without regard to the correctness of the assessment. (Section 607.) But such refund or credit was not to be authorized in a case which met the following conditions: (a) an assessment seasonably made prior to June 2, 1924, (b) a claim for abatement filed with or without bond, and (c) a stay of the collection. (Section 611.)

Section 607 created no substantive rights which the taxpayer did not already enjoy except to have his claim recognized by those charged with the administration of the revenue laws. In the Revenue Act of 1924 there was introduced into the amended R.

S., section 3226, a provision sanctioning the maintenance of a suit to recover taxes illegally exacted "whether or not such tax, penalty or sum has been paid under protest or duress". Since the effective date of this Act, it would seem that every taxpayer, who had paid after the rights of the Government to collect by suit or distraint had been barred, could have prevailed in a suit to recover under section 1014 (a) of the Act of 1924, reenacted without change in the Revenue Act of 1926 (section 1113 (a)), and this would be so whether the payment or distraint was prior to the enactment (section 1106 (a)) of the Revenue Act of 1926 extinguishing all liability for the tax.

Bowers v. *Fuller*, 273 U. S. 346.

But if section 607 does not confer substantial benefits upon the taxpayer, it does not follow that section 611 did not deprive a taxpayer of important rights if his case fell within the specified exception. If, as petitioner contends, section 611 does not affect any taxpayer's rights to recover by suit taxes collected after the five-year period, then the whole scheme of the legislation fails in its announced purpose to limit refunds of taxes, paid or collected after the right to collect had been barred, to those cases only where there had been no claim in abatement and no stay of proceedings to collect. Judge Dietrich, speaking for the Circuit Court of Appeals for the Ninth Circuit, stated:

> "While textually section 611 is open to construction, upon the whole we are left in no doubt that by it Congress intended to withhold from the taxpayer the right to have refunded money paid by him in the discharge of a valid tax, under the conditions therein stated, where the only objection which could be made to its collection was the expiration of the applicable period of limitation. Otherwise the section is without meaning."

Huntley v. *Gile, supra*, at 858.

Whether we regard section 611 as operating to ratify unauthorized acts (*Wright & Taylor, Inc.* v. *Lucas, supra*; *Regla Coal Co.* v. *Bowers, supra*), or to remove the bar of the Statute of Limita-

tions in certain cases are relatively unimportant considerations. The substance of the matter is that Congress by the section undertook to withdraw from a taxpayer the right to reclaim taxes, otherwise rightfully due, which had previously been held recoverable solely on the ground that they had been paid, or collected, after the statute had run against the collection. *Wright & Taylor, Inc.* v. *Lucas, supra.*

The petitioner doubts the power of Congress to thus deprive a taxpayer of his rights of recovery which existed at the time of the enactment of the Revenue Act of 1928. I do not think any doubt can be seriously entertained in view of authorities.

Stockdale v. *The Insurance Companies*, 20 Wall. 323;
Brushaber v. *Union Pac. R. R. Co.*, 240 U. S. 1;
Rafferty v. *Smith Bell & Co. Ltd.*, 257 U. S. 226;
Smallwood v. *Gallardo*, 275 U. S. 56;
Wright & Taylor, Inc. v. *Lucas, supra;*
Regla Coal Co. v. *Bower, supra;*
Oak Worsted Mills v. *United States*, 36 F. (2d) 529.

In the *Regla Coal Company* case, Judge Mack observed:

"Plaintiff's final contention that, inasmuch as the statute had run at the time of the collection, Congress was then and is still without the constitutional power to remove the bar, cannot be sustained. It is well settled that there is no vested right to rely upon a statute of limitation to defeat a debt or other personal obligation; the Legislature which imposed the bar may remove it. *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483; *cf. Decker* v. *Pouvailsmith Corp.*, N. Y. Ct. App., decided October 15, 1929, reported in 252 N. Y. 1, 168 N. E. 442. That because of sovereign grace the expiration of the statutory period not only gave the taxpayer a defense, but also a right to recover taxes paid thereafter, does not, in my judgment, change the result. Nor is this a case like *Davis* v. *Mills*, 194 U. S. 451, 24 S. Ct. 692, 48 L. Ed. 1067, or *Danzer & Co.* v. *Gulf & S. I. R. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126, in which the grant of a

right is conditioned upon its being exercised within a prescribed period; for the right of the United States to these taxes existed prior to and independent of the grant of a limitation statute for the repose of the taxpayer. This result is identical with that reached by the Circuit Court of Appeals for the Ninth Circuit in *Huntley* v. *Gile*, 32 F. (2d) 857, and by Judge Dawson in *Wright & Taylor, Inc.* v. *Lucas, supra*, in both of which cases the constitutionalty of section 611 (26 U. S. C. A., sec. 2611) was sustained."

A further contention of the petitioner is that if section 611 be so construed as to affect retroactively a taxpayer's rights to recover taxes paid or collected after their collection was barred by statutes then existing, its rights are not to be destroyed because it presents a case which does not come within the exceptions created in section 611, since there was no compulsory stay of proceedings; in other words, that the delay was voluntary, not under the compulsion of any law, order of court, agreement or act of the taxpayer which placed the Commissioner under a moral obligation to refrain.

Whether this contention can be accepted as valid depends on how the word "stayed", as used in section 611, is to be defined. On this question of interpretation the Federal courts in other circuits are wholly at variance. Some hold that the word was employed in its legal sense and must be limited to a stay compelled by law, by the courts, by agreement or by some act of the taxpayer.

United States v. *Burden Smith & Co.*, 33 F. (2d) 229;
Cutcheon v. *Rafferty*, 34 F. (2d) 708;
Pepsin Syrup Co. v. *Schwaner*, 35 F. (2d) 197;
Sugarland Industries v. *Bass*, 36 F. (2d) 375.

On the other hand, it has been held that the word "stayed" is to be taken as synonymous with "delayed", and if there was a delay following upon, or occasioned by, a claim in abatement the collection was "stayed" whether the delay was voluntary or involuntary.

Regla Coal Co. v. *Bowers, supra*;
Wright & Taylor, Inc. v. *Lucas, supra*;
Oak Worsted Co. v. *United States, supra*;
Goodcell v. *Graham et al.*, 35 F. (2d) 586;
Magee v. *United States*, 37 F. (2d) 763.

My opinion is that the word "stayed" should be given the broader definition. I have reached this conclusion, first, because I regard the reasons advanced by the learned judges who have abscribed to the word the broader meaning to be sound and convincing, and secondly, because the narrower definition robs the section of much of its capacity to meet the situation it was obviously intended to remedy. As has been pointed out in the cases cited, notably the *Wright & Taylor* case and the *Regla Coal Co.* case, in none of the revenue acts extant on June 2, 1924 was there any provision which legally stayed the collection of a tax unless the claim for an abatement was accompanied by a bond. (See Rev. Act of 1918, sec. 234, para. 14 (40 Stat. 1079).) The regulations of the treasury department clearly indicated that such a claim did not stay any proceedings to collect the tax. Reg. 33, Art. 261; Reg. 45, Art. 1032; Reg. 62, Art. 1032. That the legislative body read the word "stayed" to mean "delayed" is shown by a report of the Senate committee which, I think, has not been referred to in other opinions. The finance committee of the Senate recommended that section 611 be entirely eliminated, and in its report it stated:

> "Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the collection delayed by the filing of a claim in abatement, and also prohibits the refund of amounts paid after the statute of limitations in such cases. Your committee believes that the bar of the statute should be made effective as to both the Government and the taxpayer and recommends that this section be eliminated."

This section, however, was later restored as it came from the

House with the exception that section 611 (b) was eliminated. Section 611 (b) provided that a distraint, or proceeding in court, could be begun within one year after the enactment of the Act for collection of taxes not already paid which fulfilled the conditions of section 611. I refer to this because petitioner has argued that the congressional records adverted to by the courts are not to be considered as helpful, as these reports dealt with the original section 611 which included 611 (b). But I am unable to see how the elimination of 611 (b) impairs the value of the contemporaneous reports of legislative committees. It was to refunds of taxes already paid that the committee addressed its observations.

Correspondence and a restricted waiver subsequent to April 30, 1923, were introduced tending to show that the delay was at the request of the petitioner. Whether these were sufficient to constitute a legal stay, or whether acts committed after the statute of limitations had run have any important bearing on the applicability of section 611, are questions that need not be decided in view of the conclusion I have reached upon the interpretation of the language of the Act. It is sufficient to find, as I do, that there was a claim for an abatement and a stay of the collection as a consequence of the claim. This brings the case at bar within the exceptions of the section, which defeat petitioner's asserted rights to recover.

Nor do I see any ground for distinction between the case at bar and the cases which have upheld the Government's contention based on the fact that the taxes were collected by distraint rather than paid under protest. Such a distinction would have little of substance to recommend it. Payment under protest when threatened with a warrant of distraint would be given the same legal effects as a collection by distraint. There can be no justification in law for exempting from the operation of section 611 taxpayers who, instead of avoiding threatened distraint by payment, allowed the warrant of distraint to be executed. Such a result would give too great singificance to the word "payment" and would be inconsistent with the purposes of the statute. In my

opinion the section must be held to apply as well to one case as the other.

I find and rule, therefore, that section 611 defeats the petitioner's right to recover in these proceedings, and judgment should be entered for the defendant.

PETITION FOR APPEAL OF AMERICAN GLUE COMPANY.

[Filed September 12, 1930.]

Now comes the petitioner, American Glue Company, conceiving itself aggrieved by the findings, rulings and opinion of the court and by the judgment entered in pursuance thereof in the above-entitled cause on the eighth day of September, A. D. 1930, and hereby appeals from said findings, rulings and judgment to the United States Circuit Court of Appeals for the First Circuit for the reasons specified in the assignment of error filed herewith; and it prays that this appeal may be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that a proper order relating to the required security to be required of it be made.

By its Attorneys,

ROBERT E. GOODWIN,
HARRIS H. GILMAN.

September 15, 1930. Appeal allowed.

JAMES A. LOWELL,
United States District Judge.

PETITIONER'S ASSIGNMENT OF ERRORS.

[Filed September 12, 1930.]

The petitioner in this action in connection with its petition for appeal, makes the following assignment of errors which it avers occurred upon trial of the case, to wit:

I. That the United States District Court for the District of

Massachusetts erred in ruling that the petitioner was not entitled to recover.

II. That the United States District Court for the District of Massachusetts erred in ruling that the petitioner was not entitled to recover under sections 607 and 611 of the Revenue Act of 1928 all interest and penalties, not assessed prior to June 2, 1924, which were collected from it in respect to taxes for the year 1917.

III. That the United States District Court for the District of Massachusetts erred in refusing to grant the requests of the petitioner for rulings of law as follows:

1. "The seizure, under warrant for distraint, of the sum of $233,263.89 from the petitioner on November 24, 1925 by the Collector of Internal Revenue for the District of Massachusetts, was illegal and the petitioner may recover from the United States of America said sum of $233,263.89 with interest thereon from the date of seizure in accordance with the provision of Revised Statutes 3226 as amended by section 1111 of the Revenue Act of 1926.

2. "The sole purpose and effect of section 607 of the Revenue Act of 1928 was to enlarge the class of taxpayers who were entitled to sue and recover under the provisions of section 3226 of the Revised Statutes as amended.

3. "Section 607 of the Revenue Act of 1928 did not limit, take away, or in any way affect any right of action which the petitioner had at the date of its enactment.

4. "Section 611 of the Revenue Act of 1928 did not take away any right of action which the petitioner had at the date of its enactment.

5. "Section 611 of the Revenue Act of 1928 did not by express terms or by implication do more than limit the scope and effect of section 607 of the Revenue Act of 1928 and did not of itself grant any rights or privileges whatsoever.

6. "The illegal seizure of said sum of $233,263.89 in 1925 by the Collector of Internal Revenue did not effect a payment or satisfaction of the petitioner's tax liability (if any liability then existed), since said seizure was illegal and said tax liabil-

ity (if any) remained (even though the respondent's remedy to enforce collection had become barred) until the enactment of section 1106 of the Revenue Act of 1926, by which last named enactment such liability, if any, became extinguished and was not recreated or revived by the enactment of section 612 of the Revenue Act of 1928.

7. "The collection of the additional tax assessed against the petitioner in September, 1920, was never 'stayed' within the meaning of the word as used in section 611 of the Revenue Act of 1928."

IV. The United States District Court for the District of Massachesetts erred in granting the rulings on matters of law requested by the respondent, as follows:

(a) "That the withholding, delaying and postponement of collection by the Collector in this case, because of the filing of the claim for abatement, was a stay of collection within the meaning of section 611 of the Revenue Act of 1928.

(b) "That the provisions of section 611 of the Revenue Act of 1928 apply to the facts of this case and furnish a complete defense to this suit.

(c) "That the petitioner is not entitled to recover in this action."

V. That the United States District Court for the District of Massachusetts erred in making the rulings of law in its opinion handed down on the twenty-sixth day of June, 1930, as follows:

(1) That judgment should be entered for the respondent.

(2) That section 611 of the Revenue Act of 1928 defeats the petitioner's right to recover in these proceedings.

(3) That the construction put upon section 611 of the Revenue Act of 1928 by Judge Dawson in *Wright & Taylor, Inc.* v. *Lucas,* by Judge Mack in *Regla Coal Co.* v. *Bowers,* and by Judge Deitrich in *Huntley* v. *Giles* is the correct construction and the one necessary to give effect to the intent and purpose of the legislation of 1928 as revealed in Congressional documents.

(4) That resort may properly be had to reports of legislative com-

mittees for the purpose of ascertaining the occasion and necessity for the enactment of section 607 and section 611 of the Revenue Act of 1928, the situation confronting Congress under the earlier laws and the proposed remedy of the new law.

(5) That section 607 of the Revenue Act of 1928 created no substantive rights which the taxpayer did not already enjoy, except to have his claim recognized by those charged with the administration of the Revenue Laws.

(6) That if section 611 of the Revenue Act of 1928 does not affect a taxpayer's right to recover by suit taxes collected after the five-year period, then the whole scheme of the legislation fails in its announced purpose to limit refunds of taxes paid or collected, after the right to collect had been barred, to those cases where there had been no claim in abatement and no stay of proceedings to collect.

(7) That the right of the petitioner to reclaim taxes illegally collected was withdrawn by the provisions of section 611 of the Revenue Act of 1928.

(8) That Congress, by section 611 of the Revenue Act of 1928, undertook to withdraw from a taxpayer the right to reclaim taxes (otherwise rightfully due) which had previously been held recoverable solely on the ground that they had been paid or collected after the statute had run against the collection.

(9) That the word "stayed" as used in section 611 of the Revenue Act of 1928 should be taken as synonymous with "delayed" and if there was a voluntary or involuntary delay, following upon or occasioned by a claim in abatement, the collection was stayed.

(10) That a claim for abatement having been filed, there was a stay of the collection of the tax as a consequence of such claim for abatement.

(11) That payments under protest when a taxpayer is threatened with a warrant of distraint should be given the same legal effect as a collection by distraint.

(12) There can be no justification in law for exempting from the operation of section 611 of the Revenue Act of 1928 taxpayers

who, instead of avoiding threatened distraint by payment, allowed the warrant of distraint to be executed.

VI. That the United States District Court for the District of Massachusetts erred in admitting in evidence at the trial of the case the following documents over the objection of the petitioner and subject to its exception:

(a) Restricted waiver of assessment of taxes dated December 15, 1923.

(b) Certain correspondence between the petitioner and the Commissioner and the Collector which was sent and received after the period of limitation had expired.

Wherefore the appellant prays that said judgment be reversed and that said District Court for the District of Massachusetts be ordered to enter a decree reversing the decision of said District Court in said cause.

ROBERT E. GOODWIN,
HARRIS H. GILMAN,
Attorneys for the Appellant,
AMERICAN GLUE COMPANY.

BOND ON APPEAL.

[Filed September 12, 1930; Approved September 15, 1930.]

Know all Men by these Presents, That we American Glue Company a corporation duly incorporated under the laws of Massachusetts, as principal, and American Employers' Insurance Company, a corporation duly organized and existing under the laws of the State of Massachusetts, having an usual place of business in Boston as surety, are held and firmly bound unto the United States of America in the full and just sum of Two hundred and fifty dollars ($250.) to be paid to the said United States of America their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-eighth day of August in the year of our Lord one thousand nine hundred and thirty.

Whereas, lately at a District Court of the United States for the District of Massachusetts in a suit in depending in said Court between American Glue Company, a corporation duly incorporated under the laws of Massachusetts, and the United States of America judgment was entered against the said American Glue Company and the said American Glue Company having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the fifteenth day of October, A. D. 1930.

Now, the condition of the above obligation is such, That if the said American Glue Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN GLUE COMPANY [SEAL]
by ROBERT W. YOUNG, *Treasurer*

AMERICAN EMPLOYERS' INSURANCE COMPANY [SEAL]
By WALDEMAR J. VATTER *Attorney-in-fact.*

Sealed and delivered in presence of
ROGER UPTON

Approved. JAMES A. LOWELL,
United States District Judge.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, SS.

THE PRESIDENT OF THE UNITED STATES,
To the UNITED STATES OF AMERICA, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the City of Boston, Massachusetts, on the fifteenth day of October next, pursuant to an appeal duly obtained from a decree of the District

Court of the United States for the District of Massachusetts, wherein the American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and having a usual place of business in Boston in said Commonwealth, is appellant, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JAMES A. LOWELL, Judge of the District Court of the United States for the District of Massachusetts, this fifteenth day of September, in the year of our Lord one thousand nine hundred and thirty.

JAMES A. LOWELL,
United States District Judge.

ACKNOWLEDGMENT OF SERVICE OF CITATION ON APPEAL.

SEPTEMBER 17, 1930.

Service of the within citation is hereby acknowledged.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on appeal of the petitioner, American Glue Company, including true copies of such proofs, entries and papers on file as have been agreed upon, in the cause entitled,

No. 3510, LAW DOCKET,
AMERICAN GLUE COMPANY, PETITIONER,
v.
UNITED STATES OF AMERICA,

in said District Court determined, together with the original citation with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this eighth day of October, A. D. 1930.

[SEAL] JAMES S. ALLEN, *Clerk.*

CLERK'S CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 40, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including October 17, 1930, in the cause in said court numbered and entitled,

No. 2497.

AMERICAN GLUE COMPANY, PETITIONER, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this seventeenth day of October, A. D. 1930.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(123)

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CHARLES ELMORE

No. 519

Supreme Court of the United States.

No.

American Glue Company,
Petitioner,

v.

United States of America,
Respondent.

Petition for Writ of Certiorari.

HARRIS H. GILMAN,
Attorney for Petitioner.

ADDISON C. GUTHRIE & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1930.

No.

AMERICAN GLUE COMPANY,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

Respectfully represents your petitioner that:

1. This petition is brought under the provisions of sections 347 and 350 of Title 28 of the United States Code, which provide that the Supreme Court of the United States may require in any case in a Circuit Court of Appeals that the cause be certified to the Supreme Court for determination "either before or after a judgment or decree of such lower court," and further that "the application may be made at any time prior to the hearing and submission in that court." The petitioner's case is in the Circuit Court of Appeals, having been entered therein on October 9, 1930. Said case has not been heard or submitted to said Circuit Court of Appeals, and no judgment or decree has been rendered thereon.

Principal Facts.

2. On or about May 1, 1918, the petitioner, American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston, Massachusetts, filed its income and excess-profits tax returns for its calendar year 1917, and paid the income and excess-profits taxes shown by said returns, to wit: $514,311.62.

During September, 1920, the Commissioner of Internal Revenue assessed against the petitioner additional income and excess-profits taxes for the year 1917 in the amount of $173,674.61.

The petitioner paid $2450.80 and filed a claim in abatement of the sum of $171,223.81 on November 15, 1920, with the Collector of Internal Revenue.

On November 24, 1925, more than two and a half years after the running of the statute of limitations, the Collector of Internal Revenue served a warrant for distraint upon the Atlantic National Bank of Boston, and by virtue thereof seized $233,263.89 of the petitioner's money on deposit with said bank, of which the Collector claimed that $171,223.81 was the tax aforementioned and that $62,040.08 was the interest upon said sum of $171,223.81.

3. On January 15, 1929, American Glue Company, having complied with all requisite conditions precedent, brought a petition against the United States of America in the District Court of the United States for the District of Massachusetts. This petition was brought to recover said amount of $233,263.89.

Proceedings Below.

4. This case was tried on January 31, 1930, in the United States District Court for the District of Massachusetts, before Brewster, J., upon a substitute agreed statement of facts and additional oral testimony. An opinion was rendered, on June 26, 1930, ordering judgment for the respon-

dent and the said judgment was entered on September 8, 1930 (42 Fed. (2d) 235).

5. On September 12, 1930, the petitioner filed a petition for appeal to the United States Circuit Court of Appeals for the First Circuit, and accompanied said petition for appeal with its assignment of errors. Said appeal has not been heard and is still pending before the said Circuit Court of Appeals.

6. A certified copy of the entire record of said case in the District Court now pending in the Circuit Court of Appeals is herewith furnished in compliance with Rule 35 of this Honorable Court.

THE ISSUES.

7. The principal issues raised by the parties in the petitioner's case are as follows:

(1) The petitioner primarily contends—

(*a*) That the seizure by virtue of a distraint warrant of $233,263.89 by the Collector of Internal Revenue on November 25, 1925, was illegal, as it was made after the five-year period of limitation had run upon the collection of said tax liability as provided in section 250 (*d*) of the Revenue Act of 1921. This contention is not denied by the United States (R. p. 26).

(*b*) That the petitioner is entitled to recover said sum so illegally seized, with interest thereon, under the provisions of sections 3220 and 3226 of the Revised Statutes as amended, which sections are still in force and effect, and under the decision of the United States Supreme Court in the case of *Bowers* v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (71 L. Ed. 696).

(*c*) That the petitioner's right of action under the provisions of sections 3220 and 3226 of Revised Statutes as amended was in no way altered or amended by sections 607 and 611 of the Revenue Act of 1928.

(*d*) That sections 607 and 611 of the Revenue Act of 1928 refer to and define a new type of "overpayment" and

do not grant or deny remedies for the recovery of taxes illegally seized or distrained.

(*e*) Section 611 of the Revenue Act of 1928 cannot affect the recovery of interest illegally seized after the period of limitation where said interest was not assessed prior to June 2, 1924.

(2) The respondent contends and the United States District Court held that the petitioner's right to recover the amount so illegally seized was barred by the provisions of section 611 of the Revenue Act of 1928, because a claim for abatement of the tax in question had been filed by the petitioner, and the collection of the tax had been delayed by reason thereof.

For text of above statutes see Appendix to brief.

REASONS FOR ALLOWANCE OF THE WRIT.

8. The petitioner contends that the United States District Court erred in its rulings, opinion and judgment, as set forth in the petitioner's assignment of errors filed in the Circuit Court of Appeals and set forth on page 33 of said record attached hereto.

9. Decisions of the Circuit Courts of Appeals and the United States District Courts and the decisions of the United States Court of Claims are in conflict with respect to the issues raised by this record, as more fully set forth in the brief herewith submitted.

10. The petitioner's assignment of errors involves questions which are in general raised by appeals in certain cases now pending before the United States Supreme Court which will probably be reached for hearing during this term, *i.e.*: No. 36 *Graham* v. *Goodcell*, No. 104 *Oak Worsted Mills* v. *United States*, No. 65 *Magee* v. *United States*, No. 105 *Taft Woolen Mills* v. *United States*.

Said cases do not involve, however, all of the questions raised in the petitioner's case. Your petitioner believes that there is a great public interest in the problems involved

in these cases, as evidenced by the large number of similar cases now pending in the United States Courts throughout the country, and that because of this great public interest, the additional questions presented in its case should be considered by the United States Supreme Court at the same time as those presented in the above cases now pending, so that all the questions relevant to the principal question involved in all of the above cases shall be finally and completely determined at the time that its decision is rendered therein.

11. The questions and errors presented by this case which your petitioner believes have not been raised in any of the cases now pending before the United States Supreme Court are as follows:

(1) There was an actual seizure of the petitioner's property by the Collector of Internal Revenue by distraint proceedings, in that the *money of the petitioner* deposited in a national bank was *actually distrained and seized* by the Collector of Internal Revenue for the District of Massachusetts under a distraint warrant. The District Court was in error, therefore, in holding that sections 607 and 611 of the Revenue Act of 1928 applied to the petitioner's case, for said sections refer only to amounts "paid," and not to seizures or illegal collections, whereas said sections 3220 and 3226 of Revised Statutes expressly apply to amounts "illegally collected."

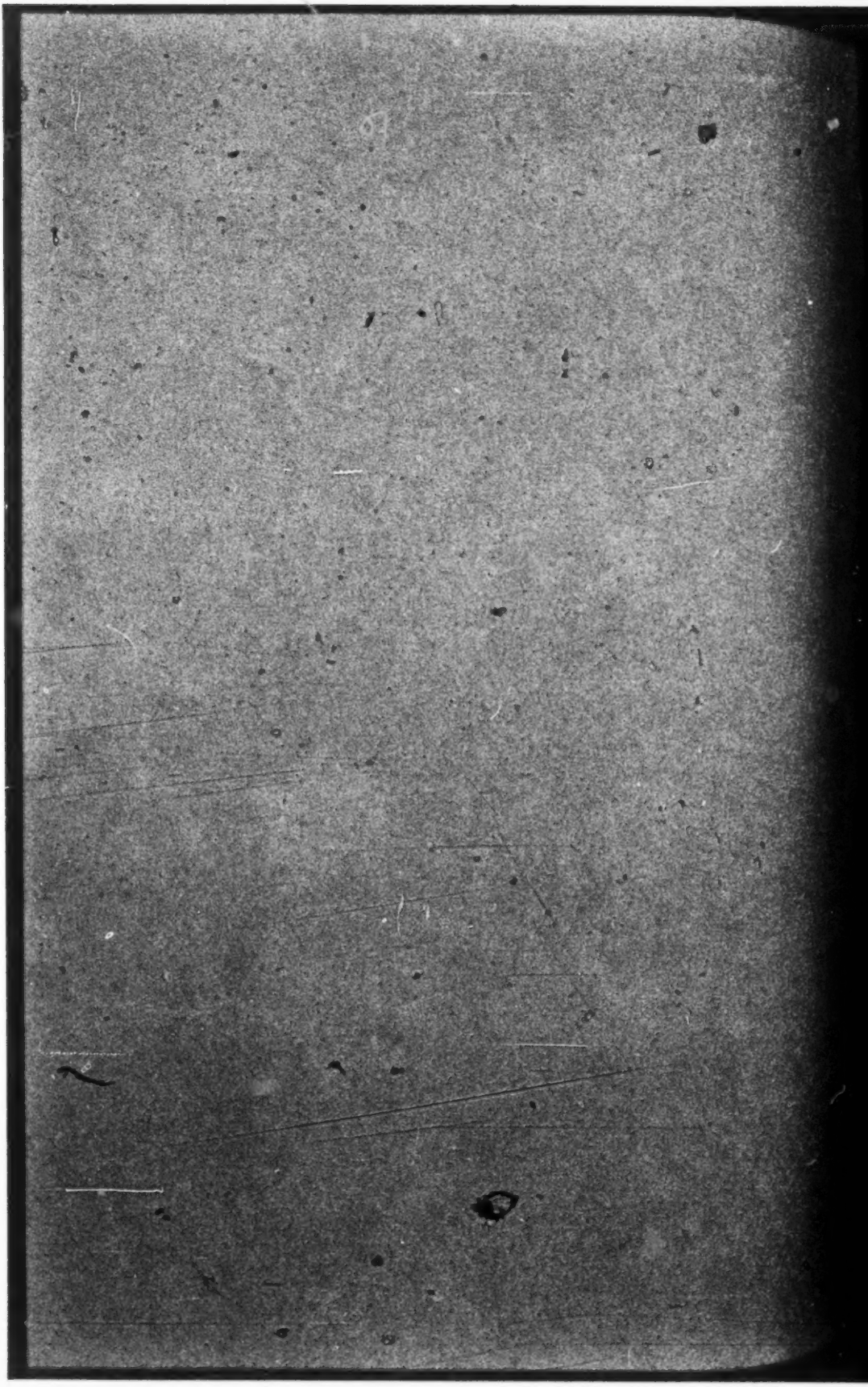
(2) Your petitioner believes that in none of the cases now pending before the Supreme Court has the question been raised in regard to the effect of section 611 upon the illegal seizure of interest by a Collector of Internal Revenue at the same time as the seizure of the tax alleged to be due. In the petitioner's case $62,040.08 was seized on November 24, 1925, which the Collector claimed to be interest upon an unpaid tax, but said *interest was not assessed prior to June 2, 1924.* Section 611 of the Revenue Act of 1928 provides that only amounts of interest actually assessed prior to

June 2, 1924, are taken out of the classification of an "overpayment" set forth in section 607; and, accordingly, irrespective of the Government's contentions, said section 611 does not bar a taxpayer's right to recover interest seized, which was not assessed prior to June 2, 1924. The petitioner contends, therefore, that the District Court erred in failing to render judgment for the petitioner for the amount of interest seized ($62,040.08), none of which was assessed prior to June 2, 1924.

12. In addition to the errors set forth above (in paragrapn 11) your petitioner particularly urges those further errors which are specified in its brief filed herewith in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit, commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said Court of Appeals in the said case entitled *American Glue Company v. United States,* No. 2497, to the end that the said case may be reviewed and determined by this Court as provided in sections 347 and 350, Title 28, of the United States Code, and that your petitioner's case may be heard immediately following the cases above mentioned (numbers 36, 65, 104, 105), now pending before this Court, and that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate, and that said judgment of the District Court for the District of Massachusetts in said case and every part thereof may be reversed by this Honorable Court.

Respectfully submitted,
HARRIS H. GILMAN,
Attorney for Petitioner.



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No. 519

Supreme Court of the United States.

No.

American Glue Company,
Petitioner,

v.

United States of America,
Respondent.

Brief in Support of Petition for Writ of Certiorari.

HARRIS H. GILMAN,
Attorney for Petitioner.

ADDISON C. MITCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1930.

No.

AMERICAN GLUE COMPANY,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court for the District of Massachusetts was rendered June 26, 1930, and is reported in 42 Fed. (2d) 235, and appears in the record (R. 25).

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of sections 347 and 350 of Title 28 of the United States Code as set forth in the petition submitted herewith. Such a case may be set down for early hearing with other cases already pending before the Court and involving somewhat similar questions, as was done in the case of *Hicks* v. *Mercantile Trust Co.*, 269 U.S. 283; 70 L. Ed. 275.

2. This case involves the applicability and interpretation of certain Federal statutes and acts; namely, sections 3220 and 3226 of Revised Statutes as amended, and sections 607 and 611 of the Revenue Act of 1928.

3. The decisions in the various Circuit Courts of Appeals and in the Court of Claims are in conflict on the principal question involved. The general question has been decided for the taxpayer in the 3d and 5th Circuits, and for the Government in the 2d and 9th Circuits and the Court of Claims.

See—

For the taxpayer:

Heiner v. *Erie Coal & Coke Co.* (C.C.A. 3), 42 Fed. (2d) 214.

United States v. *Burden, Smith Co.* (C.C.A. 5), 33 Fed. (2d) 229.

For the Government:

Reeves v. *Anderson* (C.C.A. 2), (July 21, 1930).

Huntley v. *Gile* (C.C.A. 9), 32 Fed. (2d) 857.

Magee v. *United States* (Ct. Cl.), 37 Fed. (2d) 763.

III.

Facts.

The principal facts, issues and questions in this case are set forth in the petition for certiorari.

IV.

Specification of Errors.

The petitioner maintains that the District Court for the District of Massachusetts erred in its rulings, opinion and judgment, as set forth in the assignment of error filed by the petitioner in the District Court (R. 33).

Among them, the petitioner particularly urges the following errors:

1. That the said District Court erred in ruling that the petitioner was not entitled to recover from the United States of America said sum of $233,263.89 with interest thereon from the date of seizure of said sum, under the provisions of Revised Statutes, sections 3220 and 3226 as amended (R. 16, 33).

2. That the said District Court erred in failing to give judgment for the petitioner at least for the amount of interest seized ($62,040.08) which was not assessed prior to June 2, 1924 (R. 33).

3. That the said District Court erred in that it refused to rule that sections 607 and 611 of the Revenue Act of 1928 did not take away any rights to recover for said illegal seizure which the petitioner had at the date of the enactment of said Revenue Act (R. 17).

4. That the said District Court erred in that it ruled that section 607 created no substantive rights which the taxpayer did not already enjoy except to have his claim recognized by those charged with the administration of the Revenue Laws (R. 27).

5. That the said District Court erred in that it refused to rule that section 611 of the Revenue Act of 1928 did not by express terms or by implication do more than limit the scope and effect of section 607 of the Revenue Act of 1928 and did not of itself grant any rights or privileges (R. 17).

6. That the said District Court erred in that it ruled that the provisions of section 611 of the Revenue Act of 1928 apply to the facts of this case and defeat the petitioner's right to recover (R. 18, 33).

7. That the said District Court erred in that it ruled that the word "stayed" as used in section 611 of the Revenue Act of 1928 should be taken as synonymous with "delayed," and that if there was a voluntary or involuntary delay following upon or occasioned by a claim in abatement, the

collection of the tax was "stayed" within the meaning of said section (R. 18, 31).

8. That the said District Court erred in that it ruled that the collection of the additional tax assessed against the petitioner was "stayed" within the meaning of the word as used in section 611 of the Revenue Act of 1928 (R. 18).

9. That the said District Court erred in that it ruled that resort may properly be had to reports of legislative committees for the purpose of ascertaining the meaning, the occasion for and the necessity for the enactment of section 607 and section 611 of the Revenue Act of 1928 (R. 32).

10. That the District Court erred in that it ruled that a seizure of the petitioner's money in a national bank under a warrant of distraint was a "payment" within the meaning of that word as used in section 611 of the Revenue Act of 1928 (R. 32).

V.

Argument.

Introduction.

The principal contentions of the petitioner upon which it relies may be divided into—

(1) Those contentions which the petitioner believes are open to the other appellants and petitioners in those cases involving somewhat analogous questions now pending before the United States Supreme Court, *i.e.*, No. 36, *Graham* v. *Goodcell;* No. 104, *Oak Worsted Mills* v. *United States;* No. 65, *Magee* v. *United States;* and No. 105, *Taft Woolen Mills* v. *United States.*

(2) Those further contentions which are based upon unusual features of the petitioner's case, and upon which this petitioner relies as additional and compelling reasons for the allowance of this petition for certiorari, and its prayer that this case may be heard with said cases above set forth.

A.

THE CONTENTIONS OF THE PETITIONER, WHICH MAY BE OPEN TO APPELLANTS IN THOSE CASES IN WHICH CERTIORARI HAS ALREADY BEEN GRANTED ARE HEREINAFTER BRIEFLY SET FORTH WITH A CITATION OF AUTHORITIES.

1. The seizure of the petitioner's money from a national bank under a warrant of distraint over two and one-half years after the running of the five-year period of limitation provided in section 250 (*d*) of the Revenue Act of 1921 was illegal, and the petitioner had a right to recover said amount so seized with interest, under the provisions of sections 3220 and 3226 of Revised Statutes.

Bowers v. *New York & Albany Lighterage Co.*, 273 U.S. 346; 47 S. Ct. 389; 71 L. Ed. 676.

2. The petitioner's rights under sections 3220 and 3226 of Revised Statutes are not based in any way whatsoever on the provisions of section 607; and the provisions of section 611 have no application to the petitioner's case.

See section 607, Appendix, p. 14.
Section 611 of the Revenue Act of 1928, Appendix, p. 14.

3. Section 611 by its express terms merely limits the operation of section 607.

4. Sections 607 and 611 of the Revenue Act of 1928 are procedural in character and refer only to administrative action of the Commissioner, as does section 3220 of Revised Statutes. Section 607 confers power on the Commissioner to refund or credit amounts voluntarily paid in certain instances after the period of limitation, and thus creates a new class of "overpayments" not previously recognized by the law.

Diamond Alkali Co. v. *Heiner*, 39 Fed. (2d) 643.

5. There is no implied repeal of sections 3220 and 3226 of Revised Statutes by sections 607 and 611 of the Revenue Act of 1928, because repeals by implication are not favored in the law.

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160; 72 L. Ed. 509.
Schwab v. *Doyle*, 258 U.S. 529; 66 L. Ed. 747.
Russell et al. v. *United States*, 278 U.S. 181; 73 L. Ed. 255.

6. Said section 611 does not retroactively ratify illegal collections, as it makes no reference to such collections; and, furthermore, said section in no way specifies the particular acts to be ratified, which is a recognized requirement of a statute which attempts to ratify an illegal act of a Government official.

Lincoln v. *United States*, 202 U.S. 484; 50 L. Ed. 1117.
McLeod v. *United States*, 229 U.S. 416; 57 L. Ed. 1260.
Clinton Iron & Steel Co. v. *Heiner*, 30 Fed. (2d) 542.

7. Said section 611 does not withdraw the Government's consent to be sued for an illegal collection, since it contains no express words to that effect.

Lincoln v. *United States, supra.*
McLeod v. *United States, supra.*

8. Said section 611 does not retroactively extend the statute of limitations which was in force and effect prior to the passage of the Revenue Act of 1928, for a statute will not be given such retroactive effect unless its words compel this interpretation.

Untermyer v. *Anderson*, 276 U.S. 440; 72 L. Ed. 645.

Danzer v. *Gulf & Ship Island Railroad Co.*, 268 U.S. 633; 69 L. Ed. 1126.
Fullerton-Kruger Lumber Co. v. *Northern Pacific R.R. Co.*, 266 U.S. 435; 69 L. Ed. 367.

9. Said sections 607 and 611 of the Revenue Act of 1928 have a clear meaning and therefore no reference should be made to the Congressional records to change the clear meaning of the words used in said sections. Such reference to Congressional records should be made only in cases where the language of the statute is obscure and ambiguous.

United States v. *Burden, Smith & Co.*, 33 Fed. (2d) 229.
United States v. *Missouri Pacific R.R.*, 278 U.S. 269; 73 L. Ed. 322.
Aldridge v. *Williams*, 3 How. 9, 24; 11 L. Ed. 469, 476.
Merritt v. *Welsh*, 104 U.S. 694; 26 L. Ed. 896.
United States v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, 318; 41 L. Ed. 1007, 1020.

10. The word "stay" in said section 611 refers to a legal "stay," and does not refer to a mere "delay" by the Collector of Internal Revenue. If Congress had intended to cover a case of mere inaction, it would have used the word "delay."

Sugarland Industries v. *Bass*, 36 Fed. (2d) 375.
United States v. *Burden, Smith & Co.*, *supra*.

The Government admitted in the case of American Glue Co. that there was no legal stay which prevented the Collector from collecting the tax at any time (R. 16); and the Government relied upon the proposition that "stay" means "delay."

11. Section 611 was properly drafted to protect Collectors in cases where there had been a legal stay of collection of taxes. In the past, injunctions had been granted to legally stay collections, and this situation had to be recognized.

In the following cases injunctions were granted which stayed the collection of the tax even though the injunctions in some instances were not later upheld:

Hill v. *Wallace,* 259 U.S. 44; 66 L. Ed. 822.
Graham v. *Dupont,* 283 Fed. 300; reversed, 262 U.S. 234; 67 L. Ed. 965.
Lipke v. *Lederer,* (1922) 259 U.S. 557; 66 L. Ed. 1061.
Ledbetter v. *Bailey,* (1921) 274 Fed. 375.
Fontenot v. *Accardo,* (1922) 278 Fed. 871.
Middleton v. *Mee,* (1921) 277 Fed. 492.
Marble v. *Kirkendall,* (1920) 267 Fed. 498.
Polk v. *Page,* (1921) 276 Fed. 128; reversed by C.C.A. 281 Fed. 74.

12. If the word "stayed," in section 611, is held to mean merely "delayed," then the phrase "if the collection of any part thereof was stayed" in said section has no meaning, since, in every case where the period of limitation expires, there is, necessarily a "delay" in collection. Effect should be given to every word in a statute.

United States v. *Ninety Nine Diamonds,* 139 Fed. 961 (C.C.A. 8, 1905); certiorari denied, 201 U.S. 645; 50 L. Ed. 903.
Dwight & Lloyd Sintering Co., Inc., v. *American Ore Reclamation Co.,* 263 Fed. 315 (C.C.A. 2); 252 U.S. 582; 64 L. Ed. 727, certiorari denied.
Pillsbury Flour Mills Co. v. *Great Northern Ry.,* 25 Fed. (2d) 66 (C.C.A. 8).

13. If the word "stayed," in section 611, is construed to mean a "delay" caused by a claim in abatement, then the rights of the taxpayer in each case depend upon the state of mind of the Collector, as his state of mind when he failed to collect the tax would determine whether such failure was due to the filing of a claim in abatement or to mere neglect on his part. Surely Congress could not have intended this result.

14. The Collector failed to collect within the period of limitation in this and similar cases because the Commissioner of Internal Revenue ruled that, under section 250 (*d*) of the Revenue Act of 1921, distraint was not a "proceeding," and that collection could be made at any time under a warrant of distraint (I.T. 1446; 1 I.R.B. 37-504; 2 C.B. 218).

15. Section 1106 (*a*) of the Revenue Act of 1926 extinguished the taxpayer's liability, and sections 607, 611 and 612 of the Revenue Act of 1928 could not recreate a tax liability so extinguished.

Thornhill Wagon Co. v. *Noel*, 17 Fed. (2d) 407.
Gove v. *Nichols*, 23 Fed. (2d) 856.
Ellay Co. v. *Bowers* (C.C.A.), 25 Fed. (2d) 637; certiorari denied, 48 S. Ct. 601.
Heiner v. *Erie Coal & Coke Co.*, 42 Fed. (2d) 214.
Section 1106 (*a*) of the Revenue Act of 1926, Appendix, p. 15.
Section 612 of the Revenue Act of 1928, Appendix, p. 15.

B.

Two Important Questions Raised in the Petitioner's Case which are Not Presented in the Cases now Pending before the Court.

1. An actual seizure by distraint of the petitioner's property is not a "payment" under section 611.

(*a*) The meaning of the word "payment" is plain, and it has been legally defined and construed. The authorities hold that an intention on the part of the debtor to extinguish the debt is essential to constitute a payment.

Dodge et al. v. *Freedman's Savings & Trust Co.*, 93 U.S. 379; 23 L. Ed. 920.

Bank of United States v. *Bank of Washington*, 6 Peters, 8.

Luckenbach v. *McCahan Sugar Co.*, 248 U.S. 139; 63 L. Ed. 170.

Central Trust Co. of Illinois et al. v. *Cassidy*, 300 Fed. 386.

48 Corpus Juris, 585.

(*b*) The verb "to pay" is transitive. However used it connotes an act by the "payer."

Bronson v. *Rodes*, 74 U.S. 229; 19 L. Ed. 141.
Luckenbach v. *McCahan Sugar Co., supra.*

(*c*) It is clear that where property is seized by distraint there is no act on the part of the debtor, and no intention on his part to discharge the debt.

(*d*) If Congress had wished to include collection and seizure, as well as payment, within the meaning of section 611, it would have used the word "collected," as in other parts of the act.

See Revenue Act of 1928, sections 11, 12, 13, 101 (*a*), 101 (*d*), 201 (*b*), 204 (*a*), 272 (*b*), 291, 322 (*c*).

(e) The Treasury Department has officially ruled that the words "payments made" in said section 611 apply only to *voluntary payments*, made after the date of the passage of the Revenue Act of 1928, and not to seizures or collections.

Mim. 3600; VII-2 C.B. 82.

It is inconsistent for the Government to contend before the Courts that "payment" applies to seizures and collections made prior to the passage of the Revenue Act of 1928, while at the same time it admits in the rulings of the Treasury Department that said word applies only to voluntary payments made after the passage of said act.

(f) Section 611 was enacted only after there had been stricken therefrom, as originally introduced into the House, a provision authorizing collection by distraint. This shows a deliberate Congressional intent to limit this section to "payments," and not to include "collections."

2. The interest seized in the petitioner's case not having been assessed prior to June 2, 1924, does not come within the provisions of section 611 of the Revenue Act of 1928.

Irrespective of the contentions of the Government in regard to the meaning and applications of section 611, it is clear that said section has no effect on the interest which was not assessed prior to June 2, 1924.

Section 611 expressly applies—

> "If any Internal Revenue tax (or any interest penalty, additional amount or addition to such tax) was within the period of limitation properly applicable thereto assessed prior to June 2, 1924."

No additional assessment other than the assessment of $173,674.61 was ever made by the Commissioner of Internal Revenue. See Assessment Card (R. 20-21).

It is submitted, therefore, that at least the said sum of $62,040.08, which was seized on November 24, 1925, and which the Collector claimed to be interest on an unpaid tax, should be refunded, in that the collection was illegal and recovery thereof cannot be barred by the provisions of section 611 under any interpretation.

It is further submitted that, in view of all the above considerations, the rulings, opinion and judgment of the District Court for the District of Massachusetts were clearly erroneous and that the intervention of your Honorable Court is urgently requested so that the additional questions of great public interest presented by your petitioner's case may be considered at the time that a decision is rendered in the cases involving somewhat similar questions which are now pending before the Court.

HARRIS H. GILMAN.

APPENDIX.

Section 250 (d) of the Revenue Act of 1921.

"(d) . . . no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts . . . shall be begun, after the expiration of five years after the date when such return was filed, . . ."

Revised Statutes, Section 3220 (as amended by the Revenue Act of 1928).

"Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate and gift taxes, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section.

Revised Statutes, Section 3226 (as amended by Section 1113 (a) of the Revenue Act of 1926).

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected

without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Revenue Act of 1928.

Section 607—*Effect of Expiration of Period of Limitation against United States.*

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 611—*Collections Stayed by Claim in Abatement.*

"If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed,

with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Revenue Act of 1926, Section 1106 (a).

Final Determinations and Assessments.

The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability, but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Revenue Act of 1928, Section 612.

Repeal of Section 1106 (a) of 1926 Act.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

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In the

Supreme Court of the United States.

October Term, 1930.

No. 519.

Eastern Equities Corporation,
formerly bearing the corporate name
American Glue Company,
Petitioner,

v.

United States of America,
Respondent.

BRIEF FOR PETITIONER.

ROBERT E. GOODWIN,
HARRIS H. GILMAN,
Counsel for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 519.

EASTERN EQUITIES CORPORATION,
formerly bearing the corporate name
AMERICAN GLUE COMPANY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

BRIEF FOR PETITIONER.

OPINION OF THE COURT BELOW.

The opinion of the District Court for the District of Massachusetts was rendered June 26, 1930, and is reported in 42 Fed. (2d) 235, under the caption *American Glue Company* v. *United States of America,* and appears at R. 25.

The case is before this Court on writ of certiorari directed to the Circuit Court of Appeals for the First Circuit before hearing in that Court.

Since the entry of the case in this Court, the corporate name of the petitioner has been changed to Eastern Equities Corporation (see Stipulation filed November 29, 1930).

There has been no change in the corporate entity of the petitioner.

JURISDICTION.

On November 24, 1930, this Court granted a writ of certiorari under the provisions of sections 347 and 350 of title 28 of the United States Code.

The judgment sought to be reviewed was entered in the District Court for the District of Massachusetts on September 8, 1930 (R. 12). On September 12, 1930, the petitioner filed its appeal therefrom to the Circuit Court of Appeals for the First Circuit. The appeal was allowed on September 15, 1930 (R. 33), and was duly perfected. Before a hearing was had in the Circuit Court of Appeals, certiorari was granted.

STATEMENT OF THE FACTS.

On or about May 1, 1918, the petitioner, then bearing the corporate name American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston, Massachusetts, filed its income and excess-profits tax returns for its calendar year 1917, and paid the income and excess-profits taxes shown by said returns, to wit, $514,311.62 (R. 5, 6).

During September, 1920, the Commissioner of Internal Revenue assessed against the petitioner additional income and excess-profits taxes for the year 1917 in the amount of $173,674.61 (R. 6).

The petitioner paid $2450.80 and filed a claim in abatement of the sum of $171,223.81 on November 15, 1920, with the Collector of Internal Revenue (R. 6).

On November 24, 1925, more than two and a half years after the running of the statute of limitations, *the Collector of Internal Revenue served a warrant for distraint upon the Atlantic National Bank of Boston, and by virtue thereof seized $233,263.89 of the petitioner's money on deposit with said bank, of which the Collector claimed that $171,223.81*

was the tax aforementioned and that $62,040.08 was the interest upon said sum of $171,223.81. The Collector paid the money so seized into the Treasury of the United States (R. 6, 7).

On January 15, 1929, the petitioner, having complied with all requisite conditions precedent, brought a petition against the United States of America in the District Court of the United States for the District of Massachusetts to recover said amount of $233,263.89 (R. 12, 13).

The District Court ruled that the petitioner's right to recover the money illegally seized was taken away by the enactment of section 611 of the Revenue Act of 1928, and entered judgment for the respondent (R. 33).

Schedule of Important Dates.

1917 tax return filed	May	1, 1918
Tax shown by the taxpayer's return ($514,311.62) paid	During	1918
Additional assessment ($173,674.61)	Sept. list	1920
Notice and demand for payment of additional assessment	Nov.	6, 1920
Claim in abatement filed ($171,223.81)	Nov.	15, 1920
Payment of part of additional assessment admitted to be due ($2450.80)	Nov.	16, 1920
Notice and demand for payment of additional tax	April	29, 1921
Five-year period from date of filing tax return expired	April	30, 1923
Notice and demand for additional tax	Oct.	25, 1923
Warrant for distraint dated	Sept.	22, 1925
Property seized under warrant for distraint ($233,263.89)	Nov.	24, 1925
Claim for refund filed ($233,263.89)	Dec.	31, 1925
Claim for refund denied	Oct.	16, 1926
Suit commenced (within five years of payment of tax)	Jan.	15, 1929

SPECIFICATION OF ERRORS.

The following of the assigned errors will be urged, the other errors assigned in the petitioner's bill of exceptions being in amplification thereof:

1. The District Court erred in ruling that the provisions of section 611 of the Revenue Act of 1928 apply to the facts of this case and furnish a complete defense to this suit and defeat the petitioner's right to recover in these proceedings (R. 35).

2. The District Court erred in ruling that section 607 of the Revenue Act of 1928 created no substantive rights which a taxpayer did not already enjoy, except to have his claim recognized by those charged with the administration of the revenue laws (R. 27).

3. The District Court erred in ruling that Congress, by section 611 of the Revenue Act of 1928, undertook to withdraw from the taxpayer the right to reclaim taxes (otherwise rightfully due) which had previously been held recoverable solely on the ground that they had been paid or collected after the statute had run against collection (R. 36).

4. The District Court erred in ruling that the withholding, delaying, and postponement of collection by the Collector in this case, because of the filing of the claim in abatement, was a stay of collection within the meaning of section 611 of the Revenue Act of 1928 (R. 35), and that the word "stayed" as used in section 611 of the Revenue Act of 1928 should be taken as synonymous with "delayed," and that if there was a voluntary or involuntary delay following upon or occasioned by a claim in abatement, the collection was "stayed" (R. 36).

5. The District Court erred in ruling that the petitioner was not entitled to recover interest and penalties not assessed prior to June 2, 1924, which were collected from it in respect to taxes for the year 1917 (R. 34).

6. The District Court erred in ruling that the petitioner is not entitled to recover (R. 33, 34) and in ordering judgment for the respondent (R. 35).

QUESTION PRESENTED.

The question presented is:

Did the enactment of section 611 of the Revenue Act of 1928 take away, in whole or in part, the petitioner's then existing right of action against the United States for the recovery of its property illegally seized and retained by the United States?

[Note: *In this case the Collector of Internal Revenue actually seized, under a warrant of distraint, certain funds of the taxpayer on deposit in a national bank,* whereas counsel for the petitioner understand that in the other cases pending before this Court, involving the meaning and effect of section 611 of the Revenue Act of 1928, the taxes were paid without seizure.]

THE STATUTES INVOLVED.

Revised Statutes, Section 3220 (as Amended).

The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector,

agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section.

[Note: Revised Statutes, sec. 3220, was amended by section 1111 of the Revenue Act of 1926; the amendment inserted at the beginning of the section the words "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926." These words were stricken out by section 619 (*b*) of the Revenue Act of May 29, 1928, c. 852, which inserted in lieu thereof "Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes,". Chapter 901, approved later on the same day, provided that "Section 3220, Revised Statutes as amended, is amended to read as follows," and the section as therein set out omits the exception above mentioned. Accordingly, this exception is omitted in the complete text of the section set forth above.]

REVISED STATUTES, SECTION 3226 (AS AMENDED).

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or pro-

ceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

REVENUE ACT OF 1928.

Title IV—Administrative Provisions.

Section 607. Effect of Expiration of Period of Limitation Against United States.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

REVENUE ACT OF 1928.

Title IV—Administrative Provisions.

Section 611. Collections Stayed by Claim in Abatement.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act)

shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Note: The following additional statutes and Treasury Regulations referred to in the argument are set forth in the Appendix:

Sections 250 (*b*) and 250 (*d*) of Revenue Act 1921.
Section 1106 (*a*) of Revenue Act 1926.
Sections 321, 322, and 612 of Revenue Act 1928.
Regulation 62, article 1032.

LEGISLATIVE HISTORY OF SECTIONS 607 AND 611.

As first drawn by the House of Representatives (H.R. 1, as reported by Senate Finance Committee, 70th Congress, First Session) section 611 of the Revenue Act of 1928 contained an additional clause, designated (*b*), designed to extend the time within which the Government could go out and collect taxes which had been or were about to become barred by the running of the statute of limitations. This proposed clause (*b*) read as follows:

> "(b) A distraint or proceedings in court for the collection of such part may be begun within one year after the enactment of this Act."

The Senate struck out all of section 611 as framed by the House, including both clause (*a*) and clause (*b*). In joint conference the House insisted upon the retention of section 611 (*a*), but receded as to clause (*b*), and the statute, as finally enacted, contained no provision authorizing the future collection of barred taxes.

SUMMARY OF ARGUMENT.

Upon the illegal seizure of the petitioner's property under the Collector's warrant of distraint, the petitioner had a right of recovery against the respondent, under Revised Statutes, sec. 3226, because the seizure constituted an illegal collection.

Section 611 of the Revenue Act of 1928 did not take away or extinguish the petitioner's right of action. The sole function of section 611 is to limit the scope of section 607 of the same act; and the sole function of section 607 was to create a new type of recoverable "overpayment," namely, a voluntary payment made after the applicable statute of limitations had barred collection. Sections 607 and 611 of the Revenue Act of 1928 apply only to *voluntary* payments and do not apply to involuntary payments or to cases where the taxpayer's property was illegally seized by the Collector under a warrant of distraint. The victim of an illegal collection, brought about by a seizure of his property to satisfy a tax liability which had become barred by the statute of limitations, already had ample protection under the statutes and decisions, and needed no new legislation to protect his rights against the illegal acts of Collectors.

Sections 607 and 611 by their own express terms apply only to cases where taxes are *"paid"* and where *"payments"* are made. Their operation cannot be extended to cases where the taxpayer paid nothing but his property was illegally seized.

Sections 607 and 611, if given the effect urged by the respondent, would effect by implication the partial repeal of section 3226 of the Revised Statutes. There is nothing in the wording of the later legislation to indicate that any partial repeal was intended, and this result should not be brought about by implication.

Neither do sections 607 and 611 retroactively ratify the illegal collection of which the petitioner was the victim,

nor do these sections withdraw the respondent's consent to be sued therefor. The sections of the statute under discussion are not sufficiently explicit to enable them to perform the function of a retroactive ratification or of the withdrawal of an existing consent on the part of the Government to be sued.

The collection of the tax in the case at bar was never "stayed" in the sense in which the term is used in section 611, and therefore the petitioner's case is not affected by the enactment of that section. The word "stayed" used in this section means an active intervention which prevented collection. Congress did not intend that the word "stayed" should be construed as including the voluntary inaction of the Collector.

The "stay" of collection is not by the terms of section 611 made dependent in any way upon the filing of a claim in abatement, nor could a stay be legally caused by the filing of such a claim.

To adopt the construction of sections 607 and 611 urged by the respondent involves the violation of fundamental rules of statutory construction. Words must be added to both sections of the statute, and words which appear in section 611 must be ignored. The respondent appears to urge such a construction, in spite of the fact that we are dealing with tax statutes which should be construed liberally in favor of the taxpayer.

Those Courts which have decided in favor of the respondent have in each instance based their decisions more upon what was said in the reports and debates of Congress than upon the wording of the sections in question. The petitioner contends that there is no such obscurity or ambiguity in these two sections (sections 607 and 611) as to warrant a reference to the Congressional Record, and that in any event the Congressional debates and reports cannot be taken as giving to a statute a meaning not fairly within its words.

To construe section 611 as urged by the respondent is to render it unconstitutional, as being in violation of the Fifth Amendment of the Constitution.

The sum of $62,040.08 of the petitioner's money taken by the Collector (as interest) in excess of the amount of the balance of the tax as assessed which remained unpaid ($171,223.81) was not assessed prior to June 2, 1924, or at any other time, and was not the subject of a claim in abatement. This amount, therefore, cannot fall within the restriction imposed by section 611 of the Act of 1928, regardless of how that section may be construed as to amounts actually assessed before June 2, 1924, and with respect to which a claim in abatement was filed.

The decree of the District Court should be reversed and judgment should be ordered for the petitioner.

ARGUMENT.

Point A.

UPON THE ILLEGAL SEIZURE OF THE PETITIONER'S PROPERTY UNDER THE COLLECTOR'S WARRANT OF DISTRAINT, THE PETITIONER HAD A RIGHT OF RECOVERY AGAINST THE RESPONDENT, UNDER REVISED STATUTES, SECTION 3226.

This right of action was predicated upon the fact that the seizure by distraint constituted "*an illegal collection,*" because made after the expiration of the five-year period for collection prescribed by section 250 (*d*) of the Revenue Act of 1921.

Bowers v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (71 L. Ed. 676).

This proposition is not disputed by the respondent (see opinion of the Court below, R. 26).

The proposition is stated here for the purpose of bringing into bold relief the fact that the petitioner is entitled to recover in this case, unless the respondent can sustain its contention that subsequent legislation (section 611 of the Revenue Act of 1928) took away this right of action.

Point B.

SECTION 611 OF THE REVENUE ACT OF 1928 DID NOT TAKE AWAY OR EXTINGUISH THE PETITIONER'S RIGHT OF ACTION.

I.

Section 611 performs no function in the legislative scheme other than to limit the scope of section 607 of the same act.

For convenience the text of section 611 is re-printed here, and the portions thereof which the petitioner wishes to emphasize are set out in bold type.

> "Sec. 611. **Collections, Stayed by Claim in Abatement.** If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, **then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.**"

It is patent that the only effect of this section is to limit the operation of the provisions of section 607. It provides that if the three conditions specified attach to a payment, such payment shall not be considered or classified as an

"overpayment" of the kind dealt with in section 607. Therefore, to understand the effect and meaning of section 611 we must turn to section 607.

II.

The sole function of section 607 was to create a new type of recoverable "overpayment."

For convenience section 607 is re-printed in full and the portions thereof which the petitioner wishes to emphasize are set out in bold type.

> "Sec. 607. **Effect of Expiration of Period of Limitation against United States.** Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or **paid** (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto **shall be considered an overpayment** and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

The learned judge of the District Court ruled that—

> "Section 607 created no substantive rights which the taxpayer did not already enjoy except to have his claim recognized by those charged with the administration of the revenue laws" (R. 27).

It is submitted that this was error.

The petitioner contends that section 607 created a new type of recoverable *"overpayment."* It brought within the statutory definition of the word *"overpayment,"* a payment made *"after the expiration of the period of limitation properly applicable thereto."*

Before the enactment of this section *"overpayments,"* as defined by the Revenue Acts, had been limited to payments

in an amount which "*exceeds the amount determined to be the correct amount of the tax*" (Revenue Act of 1924, sec. 272; Revenue Act of 1926, sec. 272; Revenue Act of 1928, sec. 321). Each of these sections makes specific cross-reference to that other section of the same act which deals with the administrative handling of "overpayments" (Act of 1924, sec. 281; Act of 1926, sec. 284; Act of 1928, sec. 322).

Hence, prior to the enactment of section 607, a taxpayer who had voluntarily paid a barred tax was not entitled to have the amount so paid credited or refunded under any of the provisions of these statutes, except to such extent as the payment "*exceeds the amount determined to be the correct amount.*" Presumably the payment would be in the amount determined to be the correct amount of the tax.

Furthermore, prior to the enactment of section 607 of the Revenue Act of 1928, such a voluntary payment could not be credited or refunded under the provisions of section 3220 of Revised Statutes, except to such extent as it might constitute a payment "excessive in amount," and for the same reason it would not be recoverable by suit under section 3226 of the Revised Statutes. Obviously, the acceptance of such a voluntary payment by the Collector would not constitute an "erroneous," "wrongful," or "illegal collection," so as to enable the taxpayer to take advantage of those provisions of Revised Statutes, secs. 3220, 3226, covering such collections, because a taxpayer who voluntarily made payment, after collection had been barred by the expiration of the applicable statute of limitations, would be in the same position as one who had paid a barred debt to a private debtor. His voluntary payment would constitute an acknowledgment of the debt.

Gross v. *Allen*, 141 U.S. 528 (35 L. Ed. 843).
In re Salmon, 249 Fed. 300.
Gillingham v. *Brown*, 178 Mass. 417.

The respondent appears to admit that section 607 gives to a voluntary payment, made after the expiration of the period of limitation, the status of a recoverable overpayment. Such is the Treasury Department's interpretation of the section as set forth in Mim. 3660, Cumulative Bulletin VII-2, pp. 82, 83, 84. The pertinent part of this ruling reads as follows:

"Effect of Section 607.

"(1) Section 607 provides that regardless of the correct tax liability any amount paid shall be considered an overpayment if the assessment of such amount was made after the expiration of the period of limitation on assessment, or if the payment was made after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period)."

This mimeograph letter also appears to recognize the fact that, prior to the enactment of section 607, a voluntary payment, made after the statute of limitations had barred collection, did *not* constitute an "*overpayment,*" and hence could not be credited, refunded, or recovered by suit.

It would appear, therefore, that the respondent will admit the petitioner's contention that section 607 did create a new kind of statutory "overpayment."

The object of the enactment of section 607 may well have been to relieve the voluntary payor from the consequences of his ignorance of his rights and to put him on a parity with those who resisted the demands of the Collectors to the point of creating a duress or until an illegal seizure resulted. Or its object may have been to expedite the prompt settlement of the large number of pending tax disputes (resulting from the Treasury Department's misinterpretation of the law relating to distraint) by doing away with the necessity

of establishing in each case (where there was a *payment* as distinguished from a *seizure*) that the *payment* had actually been made under such a degree of governmental pressure or threat as to constitute duress and so render the collection a wrongful or illegal collection and as such refundable or recoverable under Revised Statutes, secs. 3220 and 3226.

The divergence between the petitioner and respondent appears to come upon the point whether this section also covered the field of *involuntary payments*, so as to make it (and its complement, sec. 611) applicable to "*wrongful and illegal collections.*" Unless the respondent can establish that these sections did have the broader application, they do not affect the petitioner's rights in any way and the respondent's defense must fail.

III.

Sections 607 and 611 apply only to voluntary payments and not to involuntary payments or illegal collections.

Section 607 became effective on May 29, 1928. By its express terms it deals only with *payments, i.e.*, "Any tax . . . paid after the expiration of the period of limitation properly applicable thereto. . . ."

Previous to the enactment of section 607 the victim of a "*wrongful*" or "*illegal collection*" had a full and complete remedy for the recovery of his money, including the right to have it credited or refunded by the executive department of the Government under Revised Statutes, sec. 3220, or, that remedy failing, to sue for the recovery thereof under Revised Statutes, sec. 3226. This right in the taxpayer has been definitely established by this Court.

Graham v. *Dupont*, 262 U.S. 234 (67 L. Ed. 965).
Bowers v. *New York & Albany Lighterage Co.*, *supra* (decided February 21, 1927).

In the latter case above cited (and both cases decided with it) the illegal collections appear to have been made by seizure of the taxpayer's property under a warrant of distraint (just as in the case at bar). However, for the purpose of presenting the point now under discussion, it will be assumed that a collection under threat of seizure or other duress would constitute a "wrongful" or "illegal collection" and as such be recoverable by suit under Revised Statutes, sec. 3226.

Therefore there was no need for any new legislation to establish or confirm the right of recovery on the part of a taxpayer who, after the expiration of the limitation period, made an involuntary payment under duress or who became the victim of an illegal seizure. Revised Statutes, secs. 3220 and 3226, already afforded full protection in such cases and had done so ever since the enactment of the Revenue Act of 1918, which first prescribed a period of limitation with respect to the collection of Internal Revenue taxes (Revenue Act of 1918, sec. 250 (*d*)).

The new sections appearing in the Act of 1928 (607 and 611) did not duplicate this existing remedy. It will be demonstrated that they have no such function.

They Cannot Apply to Involuntary Payments or Seizures Made After Their Enactment.

Both sections expressly apply to payments made before as well as after the act became effective. So far as they purport to affect payments made *after* their enactment, they must, of necessity, have been intended to refer only to voluntary payments. Any other construction would, in practical effect, countenance a continuance of the practice of making illegal collections of barred taxes. It may be assumed that the respondent will not contend that, should a Collector proceed to distrain for the collection of a barred tax *after* the enactment of these sections, the victim of such

an illegal collection would have no remedy if he had filed a claim in abatement and collection had been stayed within the meaning of section 611. If such a contention should be put forth by the respondent, a complete answer to it is found in the fact that the clause in the original revenue bill (designated section 611 (*b*)), designed to extend for one year the Government's right to enforce collection of barred taxes, was stricken out and did not appear in the final legislation (see H.R. 1, 70th Congress, 1st Session). Moreover, the Treasury Department has officially adopted this interpretation of the statute in Cumulative Bulletin VII-2, pp. 82-85, wherein it points out to Collectors that the Government has completely lost its right to enforce outlawed tax claims, regardless of whether a claim in abatement had or had not been filed. This Treasury ruling provides in C.B. VII-2, p. 82, at 83:

> "Sections 607 and 611 do not authorize the Bureau *to enforce collection* of a tax *in any case* after the expiration of the period of limitation, but merely prescribe the effect of the period of limitations against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto." (Italics ours.)

It is wholly illogical to attribute to Congress the intention to expressly provide a remedy under section 607 for the recovery of a kind of illegal collection which it must have presumed would not thereafter occur, and this particularly when existing law already provided ample protection to any person who might be the victim of such an illegal collection or exaction.

If, then, these sections are not to be construed as applicable to *involuntary* payments or *illegal collections* made *after* their enactment, there would seem to be no logical basis for the contention that they apply to *involuntary pay-*

ments or *illegal collections* made *prior* thereto. There are no words in either of these sections which suggest that any such differentiation is intended.

If the respondent would claim that the provisions of section 607 apply to voluntary payments, involuntary payments, and collections made by distraint and seizure, then it must admit that, in so far as it applies to involuntary payments (brought about by duress) or to collections by distraint, or to any collections which would fall within the classification of "wrongful or illegal collections" (Rev. Stat. sec. 3220), it is merely duplicating the provisions of Revised Statutes, sec. 3220, although not in terms affording the complete remedy by suit given by Revised Statutes, sec. 3226.

The only excuse for attempting to give section 607 this broader application is to permit the Government to spring the trap of section 611 on all suitors or applicants for refund who may have filed claims in abatement at some stage of the proceedings before the Treasury Department.

Significance of Term "Overpayment."

The petitioner's contentions as to the proper scope of these sections finds support in the wording of section 607 itself, from which it is apparent that its function was primarily that of definition. In effect, section 607 says that every payment of a certain kind "*shall be considered as an overpayment.*" This definition is coupled with the administrative direction that such an overpayment shall be credited or refunded to the taxpayer if proper claim for refund is filed. The general subject of "overpayments," and the crediting and refunding thereof, is dealt with in the Revenue Act of 1928 in "Supplement O—Overpayments," which supplement contains section 321, which gives the general definition of "*overpayments,*" and section 322, which makes full provision for the administration of them.

To understand the scope and purport of these sections dealing with the subject of "overpayment," one must trace their development through the earlier enactments. This involves a study of the following sections:

Revenue Act of 1918, secs. 250 (*b*) and 252.
Revenue Act of 1921, secs. 250 (*b*) and 252.
Revenue Act of 1924, secs. 271, 272, 281.
Revenue Act of 1926, secs. 271, 272, 284.
Revenue Act of 1928, secs. 321, 322, 607, 611.

The headings of these several sections are enlightening, as well as the "*Titles*" or major sub-divisions under which they appear.

The kernel of the definition of an "overpayment" appears in Act of 1918, sec. 250 (*b*). It is the section which directs the Commissioner to examine all returns and to credit or refund "the excess" as provided in section 252 of the same act.

Section 252 provides:

> "That if, upon examination of any return of income . . . it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer."

Both of these sections in the 1918 statute appear in "Part IV, Administrative Provisions."

Clearly these sections are designed to govern the keeping of the Government's accounts with the taxpayers. They are purely administrative. They deal with credits and refunds

of excess *payments* over and above the amount which ought to have been paid after the taxpayer's return has been examined and revised or corrected. They appear along with correlative provisions relating to deficiencies appearing upon an examination of the return. They deal wholly with the administrative machinery of adjusting the ledger accounts with the Government's customers—the taxpayers.

In the subsequent Revenue Acts referred to above, these administrative provisions are developed and refined. In 1924 we find the definition of "overpayments" appearing in a separate section (272), and the administrative machinery for dealing with them is further sub-divided and formalized in section 281. The process of refinement, formalization, and sub-division continues through the Acts of 1926 and 1928, but always the sections connote the single thought of dealing with the crediting and refunding of amounts which appear *from the returns* as being in excess of what should have been assessed and charged against the taxpayer. They all have to do with bookkeeping and adjustment of current accounts consequent upon the examination and revision of the taxpayer's return. They do not purport to cover the field of claims or suits based upon illegal seizures or collections. This fact is clearly brought out in the provisions of section 284 (*d*) of the Act of 1926 and section 322 (*c*) of the Act of 1928, which expressly reserve to taxpayers the right to sue in the Courts for "any amount *collected* after the period of limitation . . . has expired," even though the adjustment of the taxpayer's account with the Government is pending before the Board of Tax Appeals. If such a *collection* had been regarded as an "overpayment," this provision would have no logical basis to support it.

It is submitted, therefore, that section 607 is supplemental to those other sections which deal with *"overpayments."* As such it must be read as an adjunct to section 321 of the Act of 1928, and construed in the light of the historical development of this section. This being so, section 611 must

be read as a part of section 607, the same as if its provisions had been adjoined to it by some such phrase as "provided however." So read and construed these sections (607 and 611) can have reference only to voluntary payments and cannot refer to illegal collections, whether made by seizure or otherwise.

IV.

Even if sections 607 and 611 might be held to apply to PAYMENTS made under duress, they cannot apply to a case wherein there was a SEIZURE by the Collector, but no PAYMENT by the taxpayer.

In the case at bar the petitioner made no payment. Its property was seized and the money turned into the Treasury of the United States (R. 6, 7). In this respect the petitioner's case differs from other cases which have come before the Courts involving these sections. The difference may well be of vital importance.

It is significant that both sections 607 and 611 employ only the words "paid" and "payment" in referring to what transpired between the taxpayer and the Government. But the petitioner never made any *payment* or *paid* any money. Its bank account was seized by the Collector under a warrant of distraint (R. 6, 7). The distinction here made is not fanciful.

Throughout the Revenue Acts a differentiation is made between the "payment" of a tax and the "collection" of a tax. The differentiation appears with especial clearness in section 322 (*c*) of the Act of 1928, wherein a taxpayer's right to sue for—

(1) Overpayments, or
(2) Excessive collections, or
(3) Amounts collected after the limitation period has expired—

are listed and dealt with in separate numbered clauses, showing that each was a different kind of right (see also section 284 of the Act of 1926).

There is special significance in the fact that in the section *next preceding section 607* (namely, section 606 of the Revenue Act of 1928) both *"collection"* and *"payment"* are enumerated, one after the other in the same clause, thus indicating that in the legislative mind they are not the same thing and that as ordinarily used neither one includes the other. On the other hand, section 609 of the same act used the word *"payment"* when referring to the making of an *"overpayment."*

The same distinction appears in many other sections, including the following: Revenue Act of 1928, secs. 11, 12, 101 (*a*), 101 (*d*), 201 (*b*), 204 (*a*), 272 (*a*), 272 (*b*), 291, 321, and 606.

Compare also the following sections of the Act of 1928, wherein the words *"paid"* and *"payment"* are used with exactitude to express the idea of voluntary payments: secs. 132, 322 (*b*) (1), 322 (*b*) (2), 613 (*e*).

There is some internal evidence within section 611 itself to show that Congress was conscious of this distinction. It uses the word "collection" to connote the action of the Collector in the exercise of the powers of his office. On the basis of respondent's theory of construction, Congress might just as well have said "and if the *payment* of any part thereof was stayed." Instead, the language used was "and if the *collection* of any part thereof was stayed."

Furthermore, when section 611 refers directly to section 607 to describe or define the scope of the earlier section, the following significant language is used:

> ". . . relating to *payments* made after the expiration of the period of limitation on assessment and collection." (Italics ours.)

This distinction is in accord with the construction which has been put upon these words by the Courts and with the accepted definitions thereof.

The verb "to pay" is transitive. It may be used in either the active or passive sense, but, however used, it connotes an act by a person who may be called the "payor."

Bronson v. *Rodes,* 74 U.S. 229 (19 L. Ed. 141).
Luckenbach v. *McCahan Co.,* 248 U.S. 139 (63 L. Ed. 170).
Hathaway v. *Davis,* 33 Cal. 161.
Bloodworth v. *Jacobs,* 2 La. Ann. 24.
Jenkins v. *Mapes,* 53 Ohio St. 110.
Robinson v. *Doolittle,* 12 Vt. 246.
Thompson v. *Kellogg,* 23 Mo. 281.
Beals v. *Ins. Co.,* 36 N.Y. 522.
Detroit &c. R.R. Co. v. *Smith,* 50 Mich. 112.
Fisher v. *City of Seattle,* 55 Wash. 396.
Sokoloff v. *National City Bank,* 224 N.Y. Supp. 102.
Kingston Bank v. *Gay,* 19 Barb. (N.Y.) 459.

The definition of "payment" set forth by the Court in the last case above cited has been repeatedly quoted and cited with approval in other jurisdictions.

The Court said (at p. 460):

> "To constitute a payment, money or some other valuable thing must be delivered by the debtor for the purpose of extinguishing the debt, . . ."

On the other hand, the word "collect" means to obtain payment either by voluntary act of the debtor or by the use of force or process by the creditor.

Black's Law Dictionary:

> "To collect a debt or claim is to obtain payment or

liquidation of it either by personal solicitation or legal proceedings."

See—

Ryan v. *Tudor*, 31 Kans. 366.
Purdy v. *The City of Independence*, 75 Iowa, 356.
Hubbell v. *Board of Commissioners*, 13 N. Mex. 546 (86 Pac. 430).
Taylor v. *Kearney Co.*, 35 Neb. 381 (53 N.W. 211).

It would seem that had Congress intended to include cases of collection by seizure within the meaning of sections 607 and 611, it would have inserted after the word "*paid*" the words "*or collected,*" and likewise in section 611 it would have inserted after the word "*payment*" the additional words "*or collection.*" Or had Congress, for sake of conciseness, wished to cover both voluntary or involuntary payments, it would seem that the words "*collected*" and "*collection*" would have been adopted as being the single words which properly could connote both.

The above considerations are supported by the provisions of section 322 of the Act of 1928. This section was designed to give the Board of Tax Appeals full and final jurisdiction to determine the true and exact or net amount of a tax payable with respect to any one year, in cases where the Government claimed a deficiency and the taxpayer claimed an overpayment; but it expressly preserved to the taxpayer his right to sue for the recovery of a tax *collected* after its *collection* had become barred by the running of the statute of limitations, even though proceedings might be pending before the Board of Tax Appeals respecting alleged deficiencies or overpayments. If, as the respondent contends, a collection by distraint after the statute has expired constitutes an "overpayment," under section 607, it was neither necessary nor logical to expressly reserve to the taxpayer,

by section 322 of the same act, a right to sue for a tax *collected* after the statute had run, even though he was still before the Board of Tax Appeals respecting the net amount of his tax liability. The provisions of section 322 of the Act of 1928 bring out the differentiation between (1) *"overpayments,"* (2) *"excessive collections,"* and (3) *"collections" made after the statute of limitations had expired.* The latter are dealt with as being in a class by themselves and as something wholly different from an ordinary *"overpayment"* or *"excessive collection."*

Indeed, if the words *"overpayment"* or *"overpaid,"* as used in the Revenue Acts, had included illegal seizures and collections, the plaintiffs in the group of cases cited as—

Bowers v. *New York & Albany Lighterage Co., supra*—

could not have recovered, because, not having *"overpaid"* their taxes, they would have been within the prohibitive clause of section 1106 (*a*) of the Revenue Act of 1926, which was in force when those cases were decided by this Court, in February, 1927.

It is submitted that these considerations all tend to show that, when employing the terms *"overpaid"* and *"overpayment,"* Congress did not intend to touch upon the field of illegal collections.

Further support is given to this suggestion when it is considered that, if the term *"overpaid,"* as used in section 1106 (*a*) of the Act of 1926, were construed to cover cases of illegal collections, the practical effect of the section would have been to allow, countenance, and ratify illegal collections and seizures made after collection had become barred by the statute of limitations. Of course such a construction is impossible.

Ellay Co. v. *Bowers*, 25 Fed. (2d) 637; certiorari denied, 277 U.S. 606 (72 L. Ed. 1012).

It must be presumed, therefore, that in phrasing sections 607 and 611 of the Act of 1928, Congress likewise intended that the term *"overpayment"* should be applicable in the same general field as formerly, thus excluding the field of illegal collections.

If the respondent's contention as to the broad application of sections 607 and 611 is correct, it is difficult to see where these sections fit in the general legislative scheme. Section 607 alone purports to grant any relief or confer any rights or privileges, but it does not, of itself, offer a complete remedy to a taxpayer who comes within its terms. Its function is primarily that of definition. It provides that payments of certain types *"shall be considered as overpayments."* But to determine what one's rights might be by virtue of having made an "overpayment," it would be necessary to look to other sections of the Revenue Act of 1928 and to sections of the Revised Statutes. Section 322 of 1928 deals with credits and refunds of overpayments, and Revised Statutes, sec. 3220, deals with refunds of *"excessive collections"*; and Revised Statutes, sec. 3226, deals with rights of action where relief before the executive departments of the Government has failed. To be sure, section 607 goes on with a direction of a purely administrative character to the effect that such "overpayments" shall be credited or refunded, provided a proper claim for refund is filed. But, as stated above, the machinery at the disposal of the taxpayer to obtain such a credit or refund must be sought in other provisions of the tax laws.

Therefore the primary function of section 607 was to define the new type of "overpayment" created by it, with the result that any "overpayment" thereby created would be administered according to the complete and elaborate provisions of statute made with respect to the crediting, refunding, or recovery by suit of all payments which fall within the general classification of "overpayments." Illegal seizures never fell within this classification.

V.

No implied repeal of Revised Statutes, sec. 3226.

The interprepation put upon sections 607 and 611 by the Court below has the effect of repealing by implication so much of Revised Statutes, sec. 3226, as gave a right of action to one whose property had been seized to satisfy a barred tax liability, but who had filed a claim in abatement respecting such tax and procured a stay of collection.

It is submitted that there is nothing in the wording of either of these sections which indicates an expressed intention to bring about such a partial repeal.

Such a result must be reached by implication, if at all. A construction which has such a result, therefore, should be avoided, since it is settled law that repeals by implication are not favored.

United States v. *Heth*, 3 Cranch, 399 (2 L. Ed. 479).

White v. *United States*, 191 U.S. 545 (48 L. Ed. 295).

Schwab v. *Doyle*, 258 U.S. 529 (66 L. Ed. 747).

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160 (72 L. Ed. 509).

Russell et al. v. *United States*, 278 U.S. 181 (73 L. Ed. 255).

Bookbinder v. *United States*, 287 Fed. 790.

Stevens v. *Biddle*, 298 Fed. 209.

In this last case the Court said, at page 212:

> ". . . It is a well-settled canon of construction that repeals by implication are not favored, and will not be held to exist, if there is any other reasonable construction; and if a former act can be harmonized with a later one, it is the duty of the court to enforce it."

See also—

Washington v. *Miller*, 235 U.S. 422, 428 (59 L. Ed. 295, 299).

In this case the Court said:

> ". . . such repeals [by implication] are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both."

There is no irreconcilable conflict between the statutes here under construction.

VI.

Section 611 does not retroactively ratify illegal collections or withdraw the Government's consent to be sued.

Since the petitioner had a right of action under existing law when sections 607 and 611 of the Act of 1928 were enacted, the respondent's contention as to their meaning and effect compels a ruling that they either—

(*a*) retroactively ratify the illegal acts of the Collectors of Internal Revenue; or

(*b*) constitute a withdrawal of the Government's consent to be sued for the recovery of past illegal collections.

It is submitted that neither of these propositions can be maintained.

(*a*) *No Retroactive Ratification.*

Section 611 is not a ratification statute. Even had Congress intended by it to ratify past illegal collections, the language used is not sufficiently explicit to accomplish this

result. To hold otherwise would ignore the well-settled rule of law that a statute which attempts to ratify an illegal act of a Government official must specify with explicitness the acts to be ratified.

Lincoln v. *United States*, 202 U.S. 484 (50 L. Ed. 1117).

McLeod v. *United States*, 229 U.S. 416 (57 L. Ed. 1260).

In the following cases, on which the respondent has relied for the proposition that Congress may ratify an illegal act of a Government official in collecting a tax or customs duty, it clearly appears that the statute which attempted such ratification was most explicit and definite in its terms, and therefore such cases are in reality authority for the petitioners' contentions.

United States v. *Heinszen*, 206 U.S. 370 (51 L. Ed. 1098).

Rafferty v. *Smith, Bell & Co.*, 257 U.S. 226 (66 L. Ed. 208).

Moreover, it appears from the above cases that the requirements for a valid ratifying statute are so strict that Congress passed several statutes before it suceeded in passing one which was sufficiently explicit to cover most of the illegal acts which it desired to ratify.

Even after the last of this series of ratification statutes, the Supreme Court refused to apply the retroactive ratification to the illegal acts of Collectors which were not within the strict meaning of the ratifying act.

McLeod v. *United States, supra.*

It should be observed also that the authority of the cases of *United States* v. *Heinszen* (*supra*) and *Rafferty* v. *Smith,*

Bell & Co. (*supra*), has been greatly weakened, if not entirely destroyed, by a subsequent decision of this Court.

Forbes Pioneer Boat Line Co. v. *Commissioners*, 258 U.S. 358 (66 L. Ed. 647).

(*b*) *No Withdrawal of the Government's Consent to be Sued.*

The requirement that a statute which attempts to ratify an illegal act of a Government official must specify with explicitness the acts to be ratified, equally applies to statutes by which it is intended that the Government withdraw its consent to be sued with respect to illegal acts of its servants or agents. Withdrawal of consent to be sued is merely the effect of the ratification of an illegal act. The cases set forth in the foregoing subdivision of the brief also support this proposition.

Point C.

THE COLLECTION OF THE TAX IN THE INSTANT CASE WAS NOT "STAYED."

Even if we assume that the petitioner's right to sue for an illegal collection was affected by section 611, nevertheless, to make the statute applicable to the case at bar, the respondent must establish that the collection of the tax was "stayed" within the meaning of the section.

The respondent admits that there was no legal "stay" in this case which prevented the Collector from making collections at any time (R. 16).

The petitioner contends that the verb "*to stay*" as used in section 611 means a legal stay. The respondent contends, and the District Court ruled, that "stayed" means no more than "delayed."

I.

The word "stayed" refers to a legal "stay."

As specifically applied to legal proceedings the verb "to stay," in its *transitive* sense, is thus defined in Webster's New International Dictionary, 1922:

> "To stop, or more usually suspend, the progress of by judicial proceedings or executive mandate."

The same dictionary defines the word in its more general application:

> "To hold from proceedings; to stop; to check; restrain; also, to hinder; delay, detain; postpone; keep back."

See also the following dictionary definitions:

Black's Law Dictionary:

> "*Stay*—A stopping; the act of arresting a judicial proceeding by the order of a Court."
>
> "*Stay of Proceedings*—Suspension by order of the Court."
>
> "*Stay of Execution*—The stopping or arresting of execution, on the judgment, that is of the creditors' right to issue execution. This is given by statute . . . or it may take place by agreement of the parties."

See also—

Words and Phrases, 3d Series:

> "Stay and injunction being often loosely used and treated as synonymous."

Words and Phrases, 1st Series:

> "*Stay*—In its general meaning to stay is to forbear

to act or to stop, but in its technical sense applies to proceedings already commenced, and as used in an *injunctional order, directing* 'that all suits and proceedings to collect a debt set forth *be* and the same *are* hereby stayed' applies not to past proceedings alone, but future ones also."

See also—

Wharton's Law Lexicon:

"Staying Proceedings:—By the Judicature Act 1875, Section 24(5), the courts have power to stay proceedings in cases where an injunction or prohibition could formerly have been obtained."

See also—

Cyclopedia Law Dictionary:

"Stay of proceeding—A suspension of proceedings in a cause either by an order of the Court or by some proceeding such as an appeal which operates ipso facto as a suspension."

See also—

Byrne's Law Dictionary:

"*Stay*—A stay of proceedings in an action is suspension of them; thus, if a plaintiff is ordered to do something and fails to do it, the proceeding may under the inherent jurisdiction of the court be ordered to be stayed until he complies with the order."

Thus it is apparent that "to stay" ordinarily connotes an intervention which has the effect of *preventing* action. The petitioner contends that "*stayed,*" as used in section 611, carries this connotation and refers to an intervention which *required* or *compelled* the Collector to desist from proceeding to collect.

II.

Section 611 does not make the "stay" dependent upon the filing or pendency of a claim in abatement.

The respondent attempts to inject into section 611 a causal relationship between the filing of the claim in abatement and the Collector's inaction. Section 611 itself contains no words which indicate the presence of any such causal relation. It reads, "if a claim in abatement was filed, with or without bond, *and* if the collection or any part thereof was stayed."

The respondent in support of its contention will undoubtedly point to the heading of section 611, which reads "Collections Stayed by Claim in Abatement." But such headings are merely aids in subdividing the text of the statute. Moreover, the word "and" as used in section 611 in the phrase "and collection of any part thereof was stayed" indicates a conjunctive rather than a causal relation between the filing of the claim in abatement and the "stay." Accordingly, the established rule should be applied that where the heading or caption of a statute is in conflict with the text, the latter prevails. This rule was applied to the construction of section 611 in—

Sugarland Industries v. *Bass* (D.C. W.D. Tex. Nov. 1929), 36 Fed. (2d) 375.

Furthermore, the Treasury regulations in effect for several years before the expiration of the period of limitation in the case at bar expressly ruled that the filing of a claim in abatement did *not* stay the collection of a tax.

Regulation 62, art. 1032.

If the "delay" must be caused by the filing of the claim in abatement, then in each case the administrative officials of the Treasury Department or the Courts must

determine as a fact what was in the mind of the Collector concerned during the period of limitation, and the rights of the taxpayer will depend upon whether the delay was due to the filing of the claim, or to oversight, carelessness, or a misunderstanding of the law governing the Government's rights to enforce collection. This seems to lead to an absurd result.

It is submitted that it is unsound to give to these words a construction which would require a determination of the mental processes or state of mind of a Collector of Internal Revenue or his numerous subordinates and to make the substantive rights of a taxpayer depend thereon. This is the more obvious when it is considered that all questions of allowances of claims in abatement are determined in the office of the Commissioner of Internal Revenue in Washington, whereas the question of the time when collection shall be made is determined by the local Collectors in the several districts. Furthermore, a Collector will naturally attribute the delay to the filing of the abatement claim, since to admit that his delay arose from neglect or mistake of law might render him personally liable on his bond, because of failure to collect without proper cause.

These facts show the impracticability of proving, as a vital and pivotal fact, this causal connection between the pendency of the claim in abatement and the enforcement of collection.

It is anticipated that the respondent will next take the point that unless "stay" is construed to mean "delay," the clause *"with or without bond"* has no meaning. It is submitted that there is no merit in this contention, because a stay of collection could be brought about by an agreement between the taxpayer and the Commissioner with or without bond (see Revenue Act of 1921, sec. 250 (*d*)); or by filing a bond (Revenue Act of 1924, sec. 279 (*a*)). And also it must be assumed that Congress had knowledge of the fact that in many cases in the past injunctions against collection

had actually been issued, notwithstanding the provisions of Revised Statutes, sec. 3224.

See, for example—

Hill v. *Wallace*, 259 U.S. 44 (66 L. Ed. 822).
Graham v. *Dupont*, 283 Fed. 300; reversed, 262 U.S. 234 (67 L. Ed. 965).
Lipke v. *Lederer*, (1922) 259 U.S. 557 (66 L. Ed. 1061).
Ledbetter v. *Bailey*, (1921) 274 Fed. 375.
Fontenot v. *Accardo*, (1922) 278 Fed. 871.
Middleton v. *Mee*, (1921) 277 Fed. 492.
Polk v. *Page*, (1921) 276 Fed. 128; reversed by C.C.A. 281 Fed. 74.

Also it is clear that the clause "*with or without bond*" qualifies or refers only to the claim in abatement and not to the stay of collection. But, as shown above, there might be a stay, *i.e.*, an enforced suspension of activity, without a bond. It might be done by stipulation or agreement and had been done by order of Court.

III.

To construe "stayed" as meaning "delayed," without reference to the claim in abatement, gives no real effect to the words "and collection was stayed."

On the other hand, if the respondent abandons a construction which necessarily involves the causal relationship between the claim in abatement and the delay, but insists upon construing the word "*stayed*" as meaning "*delayed by voluntary action of the Collector,*" then the clause in the section reading, "*and if the collection of any part thereof was stayed*" has no effective meaning, because, if the five-year statute of limitations had expired in any particular case without action by the Collector, there must necessarily

and inherently have been delay. A construction of section 611 which renders as mere surplusage the clause reading, *"and if the collection of any part thereof was stayed,"* violates the fundamental rule of construction that every word in a statute must, if possible, be given an effective meaning.

United States v. *Ninety Nine Diamonds*, 139 Fed. 961; certiorari denied, 201 U.S. 645 (50 L. Ed. 903).

Dwight & Lloyd Sintering Co., Inc., v. *American Ore Reclamation Co.*, 263 Fed. 315; certiorari denied, 252 U.S. 582 (64 L. Ed. 727).

United States v. *Daniels*, 279 Fed. 844.

Pillsbury Flour Mills Co. v. *Great Northern Ry.*, 25 Fed. (2d) 66.

VanDuren Harrington Co. v. *Northern Pacific Ry.*, 32 Fed. (2d) 466.

The dilemma in which the respondent finds itself in its efforts to distort the plain meaning of the words of section 611, as above pointed out, arises because it attempts to read into the statute words and connotations which are not there. The statute connects the clause referring to the filing of a claim in abatement with the clause relating to a stay of proceedings, by the simple conjunction *"and."* It says nothing about the *pendency* of a claim in abatement, but refers only to the *filing* thereof. If read just as it is written, its meaning is plain and logical. It provides that, if a taxpayer files a claim in abatement and also procures a stay of collection, so that the hands of the Collector are tied, and if then the statute of limitations expires, the taxpayer finds his rights under section 607 limited by the provisions of section 611. This is a sane and common-sense provision. It merely says that a taxpayer, who has tied the hands of the Collector until the statute of limitations expired, should not be allowed to take advantage of the new and liberal provisions of section 607.

But even if section 611 is stretched and distorted sufficiently to permit the construction contended for by the respondent, all that it finally accomplishes is to enlarge the class of taxpayers who are deprived of the new benefits conferred by section 607; and, since the rights of the petitioner never depended on section 607 and were not affected by its enactment, its rights are not affected by any distortion in the construction of section 611.

Point D.

THE INTERPRETATION PUT UPON SECTIONS 607 AND 611 BY THE COURT BELOW AND BY THE RESPONDENT DOES VIOLENCE TO FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION.

To give these sections the meaning and effect attributed to them by the Court below and urged by the respondent, there must be read into the sections words which are not there, and words which appear therein must be ignored or even eliminated. For example:

The words *"collected"* and *"collection"* must be imported into both sections.

Section 611 must be enlarged by adding at the end some such clause as the following:

> *"and shall not be credited or refunded or recovered by suit against any Collector or the United States of America."*

There must or should be stricken from section 611 the following clauses, viz.:

> (1) *"and if the collection of any part thereof was stayed"*; and—
>
> (2) *"under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."*

It is submitted that *all* of these insertions and deletions are necessary to make the sections express with adequate clearness and without unnecessary or meaningless words what the respondent claims they mean. But to adopt a construction which requires such adding to and subtracting from the actual legislation does violence to established and fundamental rules governing the construction of statutes.

These sections are parts of a tax statute, and are to be construed liberally in favor of the taxpayer.

Gould v. *Gould*, 245 U.S. 151 (62 L. Ed. 211).

In that case this Court said, at page 163:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

Again in the case of—

Bowers v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (71 L. Ed. 676)—

this Court said, at page 350:

> ". . . The provision is part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers."

Citing—

Eidman v. *Martinez*, 184 U.S. 578, 583 (46 L. Ed. 697, 701).

Schwab v. *Doyle*, 258 U.S. 529, 536 (66 L. Ed. 747, 753).

Whether the respondent's contentions rest upon an alleged withdrawal of its consent to be sued or upon an implied partial repeal of Revised Statutes, sec. 3226, or upon an implied ratification of illegal collections, in any case words not appearing in the text of the statute must be imported and read into it by construction, and words appearing in it must be ignored or deleted to bring about the result urged by the respondent. Section 607 is so clearly remedial in its meaning and effect that no serious contention appears to be made that its provisions in any way contribute to bring about the destruction of pre-existing rights of action. This destructive effect appears to be assigned exclusively to section 611.

The Court below (R. 31, 32), as well as all of the Courts which have upheld the contentions of the respondent, placed special reliance upon certain remarks made by members of Congress during the debates upon the Revenue Act of 1928.

It is the contention of the petitioner that there is no warrant or need to consult the Congressional Record for assistance in the construction of these two sections. They are not obscure or ambiguous or in conflict with other enactments. If they are read as part of the general scheme of tax legislation, and proper weight is given to the true meaning of the word *"overpayment,"* as used throughout the Revenue Acts, and if they are viewed in their proper relationship to sections 3220 and 3226 of the Revised Statutes and to sections 321 and 322 of the Act of 1928, there is no need or justification for reference to legislative proceedings as aids to construction. It is only in cases of obscurity, ambiguity, or doubt that such reference is justified.

Aldridge v. *Williams*, 3 How. 9 (11 L. Ed. 469).
Merritt v. *Welsh*, 104 U.S. 694 (26 L. Ed. 896).
United States v. *Trans-Missouri Freight Assn.*, 166 U.S. 290 (41 L. Ed. 1007).

Mackenzie v. *Hare,* 239 U.S. 299, 308 (60 L. Ed. 297).

United States v. *United Shoe Machinery Co.,* (1916) 234 Fed. 127.

United States v. *Gordin,* 287 Fed. 565, 572.

Auk Bay Salmon Co. v. *United States,* 300 Fed. 907.

Whatever may have been said by members of Congress during the debates, the rights of the petitioner must be determined solely by what was expressed in the bill as finally enacted.

Furthermore, to construe these sections as applicable to involuntary payments if made before their enactment, but as applicable only to voluntary payments if made thereafter (as pointed out above must be the case), would give them the effect of retroactively changing the status of taxpayers whose rights had already been fixed by earlier laws and decisions, although no such purpose or intent is expressly spelled out in the text of the sections as enacted. Such a construction would violate the accepted rule of construction stated by this Court in the case of—

United States v. *Magnolia Petroleum Co.,* 276 U.S. 160, 162 (72 L. Ed. 509, 511)—

in the following language:

> ". . . statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

This case, and the above quotation from it, was recently approved by this Court in the case of—

Russell et al. v. *United States,* 278 U.S. 181 (73 L. Ed. 255).

Following the above quotation the Court, in the Russell case, referring to an alleged retroactive effect of the Revenue Act of 1924, sec. 278, said:

> ". . . No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in Sec. 276 or otherwhere."

So, in the case at bar, no plain purpose to take away an existing right of action against the Government can be spelled out of sections 607 and 611 of the Act of 1928. On the contrary, certain of the circumstances accompanying the enactment of these two sections give positive indication that there was no intent to take away any existing rights or deprive the Courts of jurisdiction over certain classes of illegal seizure cases. Section 612 of the Act of 1928 repealed section 1106 (*a*) of the Act of 1926 and section 606 of the Act of 1928 repealed section 1106 (*b*) of the Act of 1926. This section of the Act of 1926 contained clear and explicit language to prohibit refunds or credits and to bar suits in specified cases. The section was before the same legislative draftsmen who framed sections 606 to 613, inclusive, of the Act of 1928. These draftsmen must be presumed to have known that the Courts had already decided that even the explicit prohibition against credit or refund contained in section 1106 (*a*) of the Act of 1926 did not in any way affect the right of action in the Courts of a victim of an illegal collection.

> *Ellay Co.* v. *Bowers,* 25 Fed. (2d) 637 (C.C.A. 2d Cir., April 9, 1928); certiorari denied (June 4, 1928), 277 U.S. 606 (72 L. Ed. 1012).

It seems reasonable, therefore, if not obvious, that if Congress had meant to make section 611 perform the function of cutting off rights of action in the Courts, it would

have used language even more explicit than that used in section 1106 (*a*) of the Act of 1926, which had already been judicially construed as not having that effect, in spite of its direct and positive language.

Point E.

THE EFFECT GIVEN TO SECTIONS 607 AND 611 OF THE ACT OF 1928 BY THE DISTRICT COURT VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION.

It was ruled by the Court below, and is conceded by the respondent, that the seizure of the petitioner's property in the case at bar constituted an illegal collection.

An illegal collection is no collection at all so far as affecting the open accounts between the taxpayer and the Government, and can have only the effect of setting up a separate and recoverable credit in favor of the taxpayer, which credit the Government cannot apply to other outstanding claims. This proposition is recognized in the provisions of section 284 of the Revenue Act of 1926 and section 322 of the Act of 1928. These sections deal with "Credits and Refunds." They provide in effect that, if a taxpayer's account with the Government is before the Board of Tax Appeals, the Board shall have complete jurisdiction with respect to all open debits and credits (or, as they are termed in the act, "deficiencies" and "overpayments"), except that there is expressly reserved to the taxpayer the right to proceed in the Courts against the Government for the recovery of any collection made after the applicable statute of limitations has expired. In effect, therefore, these sections of the Acts of 1926 and 1928 recognize the fact that such collections (made after the expiration of the period of limitation) cannot be used by the Government as offsets against pending tax deficiencies.

Assuming for the moment that the expiration of the period of limitation did not of itself extinguish all liability for the tax (but only barred the remedy), then the situation immediately following the illegal seizure was as follows:

1. The taxpayer owed the Government the amount of the tax, but the Government's right to enforce collection had expired; that is to say, the liability remained, but the remedy for the satisfaction thereof was lost.

2. The Government owed the petitioner the amount taken from it by seizure, because the seizure was illegal.

Thereupon, section 1106 (*a*) of the Revenue Act of 1926 was enacted, reading as follows:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability, but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

It is submitted that the enactment of this section extinguished the charge against the taxpayer on the Government's books, but left the credit in favor of the petitioner which had resulted from the illegal seizure of its property. The provision in section 1106 (*a*), that the Commissioner should grant no refunds unless the taxpayer had overpaid the tax, did not apply to cases of illegal collections or affect the right of a victim of an illegal collection to recover by suit in the Courts.

Ellay Co. v. *Bowers,* 25 Fed. (2d) 637; certiorari denied, 277 U.S. 606 (72 L. Ed. 1012).

This proposition is further supported by the fact that this Court, in the cases cited as *Bowers* v. *New York & Albany Lighterage Co.*, decided that a victim of an illegal seizure, made under the guise of collecting a tax after it had become barred by the running of the statute of limitations, could recover by a suit at law, even though he had not *overpaid* the tax, *i.e.*, paid more than the amount determined to be the correct amount of the tax. These cases were decided in February, 1927, when section 1106 (*a*) of the Act of 1926 was in full force and effect.

Therefore, even after the passage of section 1106 (*a*) of the Act of 1926, the petitioner had a recoverable net credit on the books of the Government to the extent of the amount of the illegal seizure of its property.

Now the respondent claims that section 611 operates to cut off or extinguish the right of action to recover the property thus illegally held by the Government. This is but another way of saying that section 611 operates to appropriate or confiscate the credit in the petitioner's favor on the books of the Government. This section does not purport to be a statute of limitations applicable to all claims arising by reason of illegal collections. On the contrary, it arbitrarily singles out and bars only those taxpayers who had filed claims in abatement. In other words, it makes an arbitrary distinction between those who did and those who did not contest the assessment and collection of the tax. If a taxpayer paid the tax after it became barred, and never contested it, he can recover the amount of the payment under section 607. If he contested the tax, using the method prescribed by the statutes and regulations (the filing of a claim in abatement), and then became the victim of an illegal seizure of his property, he has no right of action, and the Government appropriates or confiscates his property. It should be emphasized that the distinction made between those who may or may not recover for illegal seizures is not in any way based upon the circumstances under which the

right of action accrued or the character or time of the transaction which constituted the illegal seizure, but is based upon an arbitrary distinction as to what the taxpayer did or did not do before the right of action accrued to him and also upon what prompted the collector to delay collection.

It is submitted that a statute which attempts to affect such an arbitrary classification of rights violates the Fifth Amendment to the Constitution, and, furthermore, that a statute which arbitrarily denies the right to recover property taken without due process of law is itself a denial of due process.

This point is brought into bold relief when it is considered that the illegal act in the case at bar consisted of a seizure under executive mandate which could not be enjoined because of the provisions of Revised Statutes, section 3224.

Graham v. *Dupont*, 262 U.S. 234.

If the expiration of the period of limitation itself extinguished the petitioner's liability for the tax, the result is the same. This point is so fully covered in the briefs of other counsel in cases to be argued with the petitioner's case that it will not be developed here.

Point F.

THE AMOUNT SEIZED UNDER THE WARRANT OF DISTRAINT, WHICH THE COLLECTOR CLAIMED WAS INTEREST, DOES NOT COME WITHIN THE PROVISIONS OF SECTION 611 OF THE REVENUE ACT OF 1928, SINCE IT WAS NOT ASSESSED PRIOR TO JUNE 2, 1924, AND WAS NOT THE SUBJECT OF A CLAIM IN ABATEMENT.

Irrespective of the contentions of the respondent in regard to the meaning and application of section 611, it is

submitted that this section can have no effect on the alleged item of interest, amounting to $62,040.08, which was included in the amount seized by the Collector, because the record discloses no assessment of this item of interest prior to June 2, 1924 (see Assessment Card, Rec. 20-21), or at any other time. It is to be noted that section 611 expressly applies only if the "internal revenue tax (or any interest, penalty, additional amount or addition to such tax) was within the period of limitation properly applicable thereto assessed prior to June 2, 1924."

It is significant that this section makes an explicit differentiation between the *tax* and any *interest* or *penalty*, thus indicating that, any interest or penalty is not to be regarded as a mere incident of the tax or the initial assessment thereof, but must be the subject of a separate assessment by the Commissioner if it is to be affected by the provisions of section 611. Furthermore, section 611, by its express terms, can apply only to "such part" as was the subject of the claim in abatement. The petitioner's claim in abatement applied only to the unpaid balance of the tax itself as assessed, viz., the sum of $171,223.81 (R. 23, 24).

It is submitted, therefore, that since there was no assessment of the interest seized by the Collector in the amount of $62,040.08, and said amount was never the subject of a claim in abatement, the petitioner must be entitled to recover this amount, regardless of whether the filing of a claim in abatement or the Collector's delay in enforcing collection deprived the petitioner of its right of action to recover the tax itself.

CONCLUSION.

If the construction adopted by the Court below and urged by the respondent is to be adopted, the enactment of sections 607 and 611 has brought about the following results:

(1) If a taxpayer has an assessment made against him

and makes no contest respecting it and finally pays it after the statute has run, without duress, he may recover it back, because of the provisions of section 607.

(2) If, on the other hand, a taxpayer, against whom an assessment has been made, took every means to contest his liability and to that end used the very means prescribed by the statutes and regulations, prior to the enactment of the Revenue Act of 1924 (viz., the filing of a claim in abatement), and if he consistently maintained an attitude of protest and denial of liability until the Collector, acting under executive authority, actually seized his property under a warrant of distraint after the statutory period of limitation had expired, he has no rights, no remedies, and no relief.

Such are the inevitable consequences of an adoption of the respondent's contentions.

On the other hand, to adopt the petitioner's contention, a taxpayer, who has paid his tax after the expiration of the statute, can recover by the grace of section 607, unless he had filed a claim in abatement and had done something to tie the hands of the Collector, so that the latter was *prevented* from collecting up to the time the statute of limitations expired; and in that case, having himself interfered with the collection of the tax, he cannot take advantage of the new and liberal provisions of section 607. But, in any event, if he did not voluntarily pay the tax, but maintained his attitude of denial of liability until his property was illegally seized, then he may recover because of the illegality of the proceedings by which he was deprived of his property. The adoption of this view of the meaning and effect of these sections does no violence to any of the accepted rules of statutory construction; it imposes no strain upon the wording of the statute; it involves no question of constitutionality, and it effects a practical result.

It is submitted that these considerations demand that the decree of the United States District Court for the District of Massachusetts be reversed, and that an order be entered in this Court directing judgment for the petitioner.

Respectfully submitted,

HARRIS H. GILMAN,

Attorney for Petitioner.

ROBERT E. GOODWIN,

Of Counsel.

APPENDIX.

Revenue Act of 1921.

Part IV—Administrative Provisions.

Payment of Taxes.

Sec. 250 (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference, to the extent not covered by any credits due to the taxpayer under section 252 (hereinafter called "deficiency"), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due (or, if paid on the installment basis, on the deficiency of each installment from the time the installment was due), shall be paid upon notice and demand by the collector. If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of 1 per centum per month on the amount of such deficiency in the tax from the time it was due (or, if paid on the installment basis, on the amount of the deficiency in each installment from the time the installment was due), which penalty and interest shall become due and payable upon notice and

demand by the collector. If any part of the deficiency is due to fraud with intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax. In such case the whole amount of the tax unpaid, including the penalty so added, shall become due and payable upon notice and demand by the collector.

REVENUE ACT OF 1921.

Part IV—Administrative Provisions.

Payment of Taxes.

Sec. 250 (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act; . . .

REVENUE ACT OF 1926.

Title XI—General Administrative Provisions.

Final Determinations and Assessments.

Sec. 1106 (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

REVENUE ACT OF 1928.

Subtitle C—Supplemental Provisions.

Supplement O—Overpayments.

Section 321. Overpayment of Installment.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

REVENUE ACT OF 1928.

Subtitle C—Supplemental Provisions.

Supplement O—Overpayments.

Section 322. Refunds and Credits.

(*a*) Authorization.—Where there has been an overpayment of any tax imposed by this title, the amount of such

overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(*b*) Limitation on allowance.—

(1) Period of limitation.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) Limit on amount of credit or refund.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

(*c*) Effect of petition to Board.—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(*d*) Overpayment found by Board.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

(*e*) Tax withheld at source.—For refund of credit in case of excessive withholding at the source, see section 144 (f).

REVENUE ACT OF 1928.

Title IV—Administrative Provisions.

Section 612. Repeal of Section 1106 (a) of 1926 Act.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

REG. 62, ARTICLE 1032.

"Art. 1032. *Claims for abatement of taxes erroneously assessed*—Claims for abatement of taxes illegally or erroneously assessed shall be made on Form 843. They must be sustained by the affidavits of the parties against whom the taxes were assessed or of other parties cognizant of the facts. When a tax has been assessed and turned over to the collector, the presumption is that the assessment is correct. The burden of proof in rebutting the presumption and showing that it was improperly or illegally assessed, or that relief should be given under a remedial statute, rests upon the applicant for abatement. The affidavits must therefore contain full and explicit statements of all the material facts

relating to the claim in support of which they are offered and to the proper consideration of which they are essential. The legality of the claim is to be determined by the Commissioner upon the facts presented to him. The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund. Claims for abatement may not be filed where the taxpayer has had the benefit of the provisions of section 250 (d). See Article 1006. A collector may himself present once a month a blanket claim on Form 843 for the abatement of taxes coming within certain classes of taxes erroneously assessed."

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No. 519

In the Supreme Court of the United States

OCTOBER TERM, 1930

AMERICAN GLUE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 519

AMERICAN GLUE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition in this case, but calls attention to the fact that there has been no hearing in the Circuit Court of Appeals.

The question presented is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, should be construed to deprive the petitioner of the right which it otherwise would have had to recover taxes and interest thereon which had been collected after the statutory period of limitations had expired.

This question is the same as that involved in *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*, No. 36, October Term, 1930, certiorari

granted, March 3, 1930; *Magee* v. *United States,* No. 65, October Term, 1930, certiorari granted, May 19, 1930; *Oak Worsted Mills* v. *United States,* No. 104, October Term, 1930, certiorari granted, June 2, 1930; *Taft Woolen Company* v. *United States,* No. 105, October Term, 1930, certiorari granted, June 2, 1930; *Second National Bank of Saginaw* v. *United States,* No. 323, October Term, 1930, certiorari granted October 20, 1930; *Boston Pressed Metal Co.* v. *United States,* No. 337, October Term, 1930, certiorari granted October 20, 1930; and *Daniel Reeves, Inc.,* v. *Anderson, Collector,* No. 463, October Term, 1930, certiorari granted October 20, 1930. The facts are substantially the same in the instant case as in those cases. In addition, it appears that the amount sought to be recovered was collected by *distraint* and not as a result of direct payment by the taxpayer, and, further, that a portion of the amount collected represented interest which was not assessed prior to June 2, 1924. Petitioner urges that these facts furnish it grounds for recovery in addition to those relied upon by the taxpayers in the other cases mentioned above.

The pertinent dates in the instant case are as follows (R. 5–7):

May 1, 1918, return for 1917 filed.

September, 1920, assessment of additional tax.

November 15, 1920, claim in abatement filed.

May 1, 1923, expiration of five-year period for assessment and collection of tax.

August 18, 1924, claim in abatement rejected.

November 24, 1925, additional tax and interest collected.

December 31, 1925, claim for refund filed.

October 16, 1926, claim for refund rejected.

January 15, 1929, suit commenced.

The District Court for the District of Massachusetts held that Section 611 of the Revenue Act of 1918 barred recovery. (R. 33.) Appeal to the United States Circuit Court of Appeals for the First Circuit was allowed September 15, 1930. (R. 33.) The cause has not been heard or submitted in the Circuit Court of Appeals. Certiorari is sought by the petitioner under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Cf. *Hicks* v. *Mercantile Trust Co.*, 269 U. S. 283; *Royal Insurance Co.* v. *Fleet Corporation*, 280 U. S. 320, 325.

Since the same major question is already before this Court in several cases, the United States does not oppose the granting of the writ of certiorari.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
J. LOUIS MONARCH,
NORMAN D. KELLER,
Special Assistants to the Attorney General.

NOVEMBER, 1930.

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In the

Supreme Court of the United States.

October Term, 1930.

No. 519.

American Glue Company,
Petitioner,

v.

United States of America,
Respondent.

STIPULATION AS TO CHANGE OF CORPORATE NAME.

HARRIS H. GILMAN,
Attorney for Petitioner.
THOMAS D. THATCHER,
Solicitor General,
Attorney for Respondent.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

In the

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 519.

AMERICAN GLUE COMPANY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

STIPULATION AS TO CHANGE OF CORPORATE NAME.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that since the filing in this Court of the petition for certiorari in the above entitled case, the corporate name of the petitioner has been changed from AMERICAN GLUE COMPANY to EASTERN EQUITIES CORPORATION; that said change of corporate name was effected by an amendment to the Agreement of Association of said petitioner corporation, in accordance with the laws of the Commonwealth of Massachusetts; that said change of corporate name has not changed or affected the corporate identity of the petitioner; and that henceforth in these proceedings the petitioner shall be designated as EASTERN EQUITIES CORPORATION, to which shall be added the explanatory legend "formerly American Glue Company," or "formerly bearing the corporate name American Glue Company."

HARRIS H. GILMAN,
Attorney for Petitioner.
THOMAS D. THATCHER,
SOLICITOR GENERAL,
Attorney for Respondent.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 463

DANIEL REEVES, INC., PETITIONER,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,385)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No.

DANIEL REEVES, INC., PETITIONER,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

DANIEL REEVES, INC., Plaintiff-Appellant,
against
CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue for the Third District of New York, Defendant-Appellee

STATEMENT OF CASE

This action was commenced in the United States District Court for the Southern District of New York, by the issuance of a summons on the 22nd day of November, 1927, and the service thereof with a verified complaint upon the defendant on the 25th day of November, 1927.

Defendant duly interposed his answer and subsequently plaintiff served an amended complaint upon the attorney for the defendant on the 26th day of June, 1928. Issue was joined by the service of the amended answer on the 12th day of April, 1929.

This action came on for trial before Hon. Julian W. Mack. Jury was waived pursuant to Section 649 of the United States Revised Statutes, by stipulation dated January 16th, [fol. 2] 1930, wherein it was further agreed that the Court make special findings of fact and conclusions of law. Judgment was rendered in favor of the defendant dismissing the complaint on the merits and for costs in the sum of $30.00. Judgment was entered and filed on the 6th day of March, 1930. This appeal was allowed by order of Judge Bondy on the 28th day of March, 1930.

The plaintiff appears by Herman Goldman, its attorney, whose offices are maintained at 120 Broadway, New York City, New York, and the defendant appears by United States Attorney, Charles H. Tuttle, who has his offices in the Post Office Building, in the Borough of Manhattan, City of New York.

There has been no change of parties or attorneys.

[fol. 3] Summons, in usual form, omitted in printing.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED COMPLAINT

The plaintiff, above named, by Herman Goldman, its attorney, complaining of the defendant, alleges:

First. The plaintiff is, and at all the times hereinafter alleged was, a corporation organized under the laws of the State of New York, and having its principle place of business in New York, New York.

Second. That during the period between about March 11th, 1920, and about August 15th, 1921, William H. Edwards was the duly appointed and qualified Collector of Internal Revenue of the United States of America for the Second District of New York.

Third. That from and after April 1st, 1923, the defendant was and now is the duly appointed and qualified Collector of [fol. 5] Internal Revenue of the United States of America for the Third District of New York.

Fourth. On or about March 11th, 1920, plaintiff duly filed with said William H. Edwards, then Collector of Internal Revenue for the Second District of New York, its income and profits tax report for the year ended December 31st, 1919, in accordance with the Revenue Acts of the United States then in effect, and during the period between about March 15th, 1920, and December 15th, 1920, paid to the said Collector of Internal Revenue various sums of money aggregating $80,479.75 which plaintiff believed to be the entire amount for which it was liable for income and profits tax for the year ended December 31st, 1919.

Fifth. On or about the 5th day of April, 1924, plaintiff received from the defendant, as Collector of Internal Revenue as aforesaid, a bill and demand for payment of an additional assessment of $1,886.79 claimed to be due from plaintiff for said income and profits taxes for the year 1919.

Sixth. Thereafter and on or about the 14th day of November, 1925, the defendant illegally and erroneously collected from plaintiff the sum of $2,061.31, claimed by defendant to

be due from plaintiff to the defendant as additional income and profits tax for the year ended December 31st, 1919; which said sum was paid under protest and involuntarily and under duress to avoid, and in fear of, the penalties and the lien and the processes of warrant for distraint prescribed by the laws of the United States, in the case of failure to pay said sum made and provided.

[fol. 6] Seventh. On information and belief, that by the laws of the United States in such case made and provided and the Internal Revenue acts, the defendant was prohibited from taking any proceeding for the collection of said additional assessment on November 14, 1925, which date was more than five years after the filing of plaintiff's report of income and profits tax for the year ended December 31st, 1919.

Eighth. That no proceedings for the collection of said additional assessment and said sum of money against plaintiff were had or taken between March 11th, 1920, the date when plaintiff filed its report of income and profits tax for the year 1919 and November 14th, 1925, or within five years from the date of filing of plaintiff's aforesaid report of income and profits tax for the year 1919.

Ninth. On information and belief, that the collection by the defendant of said additional assessment was wrongful and unlawful and in violation of plaintiff's rights and a trespass on plaintiff's property.

Tenth. That on or about the 27th day of April, 1927, plaintiff duly applied in writing to the Commissioner of Internal Revenue of the Treasury Department of the United States for the refund of said additional amount by filing with the defendant on said date a claim for refund on the grounds that said additional assessment was illegally and wrongfully collected in that the proceedings for the collection thereof were not had and taken within the period between March 11th, 1920, the date the report of income [fol. 7] and profits tax of the plaintiff was filed for the year 1919, and November 14th, 1925, the date the tax was collected by the defendant or within five years after the filing by plaintiff of its income and profits tax report for the year ended December 31st, 1919.

Eleventh: On or about the 7th of November, 1927, plaintiff received from the Commissioner of Internal Revenue of the Treasury Department of the United States notice dated November 5th, 1927, that its claim for refund of said additional assessment and said sum of $2,061.31 was rejected, and neither said amount so collected nor any part thereof has been repaid to the plaintiff, and the defendant refuses to pay same to the plaintiff.

Twelfth. That by reason of the premises the defendant became and is indebted in the sum of $2,061.31 to the plaintiff.

Wherefore plaintiff demands judgment against defendant for said sum of $2,061.31, with interest thereon from November 14th, 1925, with the costs of this action.

Herman Goldman, Attorney for Plaintiff, 120 Broadway, New York City.

[fol. 8] *Duly sworn to by James J. Curran. Jurat omitted in printing.*

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER

The defendant, above named, by his attorney, Charles H. Tuttle, United States Attorney for the Southern District of New York, for his amended answer to the amended complaint herein respectfully shows and alleges:

First. Admits the allegations contained in paragraphs "First", "Second", "Third", and "Fourth" of the complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegation "which plaintiff believed to be the entire amount for which it was liable for income and profits tax for the year ended December 31st, 1919", contained in paragraph "Fourth".

Second. Admits the allegations contained in paragraph "Fifth" of the complaint.

Third. Denies the allegations contained in paragraphs "Sixth", "Seventh", "Eighth", and "Ninth" of the com-

[fol. 10] plaint, except admits, with respect to paragraph "Eighth", that the only proceeding for collection between the dates alleged by plaintiff was the sending of a notice and demand for payment of the additional assessment in the sum of $1,886.79 for the year 1919.

Fourth. Admits the allegations contained in paragraphs "Tenth" and "Eleventh" of the complaint.

Fifth. Denies the allegations contained in paragraph "Twelfth" of the complaint.

As and for a separate, complete, and Affirmative Defense to Plaintiff's Alleged Cause of Action Herein:

Sixth. On or about January 25, 1924, there was written to the plaintiff from the office of the Commissioner of Internal Revenue a letter, a copy of which is annexed hereto as Exhibit A and made a part hereof.

Seventh. That the additional assessment in the sum of $1,886.79 alleged in paragraph "Fifth" of the complaint was made in March, 1924, within four years from the date upon which plaintiff in paragraph "Fourth" of the complaint alleges that its return was filed, to wit, on or about March 11, 1920.

Eighth. Thereafter on or about April 16, 1924, the plaintiff filed a claim for abatement in the sum of $1,886.79, a copy of which is annexed hereto as Exhibit B and made a part hereof.

[fol. 11] Ninth. Thereafter, subsequent to the filing of plaintiff's said claim for abatement, no action or proceeding to collect the said additional assessment of $1,886.79 was taken, but careful consideration was given to the plaintiff's claim that it be assessed for the year 1919 in accordance with Sections 327 and 328 of the Revenue Act of 1918, and proceedings for collection were held in abeyance, administrative action for collection was withheld and delayed, and collection of said additional assessment of $1,886.79 was thereby stayed.

Tenth. Thereafter, on or about September 28, 1925, after consideration of briefs filed and arguments made on behalf of plaintiff, there was written to the plaintiff from the office of the Commissioner of Internal Revenue a letter,

a copy of which is annexed hereto as Exhibit C and made a part hereof.

Eleventh. That by virtue of the premises and of Sections 607 and 611 of the Revenue Act of 1928 the collection of the sum of $2,061.31 by the defendant from the plaintiff on or about the 14th day of November, 1925, was legal, proper, and timely made after the rejection of plaintiff's claim for abatement by the Commissioner of Internal Revenue and no refund is now due the plaintiff nor can the sum of $2,061.31, which plaintiff seeks to recover, be legally recovered in this action.

Wherefore the defendant demands judgment against the plaintiff dismissing this complaint together with the costs and disbursements of this action.

Charles H. Tuttle, United States Attorney, Southern District of New York, Attorney for Defendant.

[fol. 12] EXHIBIT A TO AMENDED ANSWER

IT:CA:T. 2205-10

Daniel Reeves, Inc., 451 West 125th Street, New York, New York.

SIRS: An examination of your income tax returns and of your books of account for the years 1918 and 1919, together with the information heretofore submitted has been made, and the results thereof are outlined in the attached statement.

In view of the fact that you have filed with this office a request for relief under the provisions of Section 327 and 328, Revenue Act of 1918, and the further fact that any overassessments found due by reason of the application of the above provisions may be jeopardized by the tolling of the Statute of Limitations unless a formal claim is filed, it is deemed expedient by this office that the above tax be assessed immediately without giving the usual thirty-day notice as provided for in Section 250 (d) of the Revenue Act of 1921, and that a claim be filed by you to protect your interests in the matter.

The Bureau will, therefore, entertain a claim for abatement if filed within ten days of receipt of notice and demand from the Collector of Internal Revenue for your district, in accordance with the provisions of Article 1006 of Regulations 62.

An appeal covering the basis of the claim should be filed, [fol. 13] setting forth in full all information upon which you base your protest against the above assessment, and any additional facts in support of your claim for the application of the relief provision of the Revenue Act of 1918. This appeal should be filed in triplicate, and should be addressed to the Commissioner of Internal Revenue for the specific attention of IT:CA:T-2205-10.

On request, a conference will be arranged prior to a final decision.

If an appeal is not filed, payment should be made upon receipt of notice and demand from the Collector of Internal Revenue for your district.

Respectfully, J. G. Bright, Deputy Commissioner,
(Signed) by F. R. Clutes, Head of Division.

DLS-2.

EXHIBIT B TO AMENDED ANSWER

Claim for

XAbatement of tax assessed

Credit against outstanding assessments

Refund of taxes illegally collected

Refund of amounts paid for stamps used in error or excess

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

[fol. 14] STATE OF NEW YORK,
County of New York, ss:

(Name of taxpayer or purchaser of stamps:) Daniel Reeves, Inc., (Residence—give street and number as well as city or town and State:) 44 West 143d Street, (Business address:) New York, N. Y.

This deponent, being duly sworn according to law, deposes and say that this statement is made on behalf of the

taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period: Year 1919.

1. Business in which engaged: ——.

2. Character of assessment or tax (State for or upon what the tax was assessed or the stamps affixed:) Corporation income and profits tax.

3. Amount of assessment or stamps purchased: ——.

4. Reduction of Tax Liability requested (Income and Profits Tax): $1,886.79.

5. Amount to be abated: $1,886.79.

6. Amount to be refunded (or such greater amount as is legally refundable): ——.

7. Dates of payment (see Colector's receipts or indorsements of canceled checks): ——. (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: ——.

11. Unpaid assessment against which credit is asked, period from —— to ——: ——.

[fol. 15] Deponent verily believes that this application should be allowed for the following reasons:

The taxpayer has received a notice and demand for additional tax in the sum of $1886.79, for the calendar year ended December 31st, 1919. The assessment is marked NC-250D. The taxpayer was not granted the benefits of Treasury Decision #3492 in regard to filing appeals, and therefore, it is respectfully requested that the additional tax of $1,886.79 be abated pending the determination of the correct tax liability of this taxpayer for the year 1919, based upon adjustments to be made to the tax liability for the year 1918 and also the company's application and claim for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918 for the taxable year ended December 31st, 1919.

(Attach additional sheets if necessary.)

(Signed) Daniel Reeves, Inc., by James J. Curran, Secretary.

Sworn to and subscribed before me this 11th day of April, 1924. John S. Quinn, Notary Public, Kings County. Clerk's No. 14. Register's No. 5006. Certificate filed in New York County. Clerk's No. 25. Register's No. 5107. Queens Co. Registry No. 184. Commission expires March 30, 1925.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

[fol. 16] EXHIBIT C TO AMENDED ANSWER

IT:E:SM-1. SR-B-4050.

Daniel Reeves, Incorporated, 451 West 125th Street, New York, New York.

SIRS: Reference is made to your protest dated March 20, 1925, against the result of the allowance of your application for assessment of your profits tax for the calendar year 1919 under the provisions of Section 328 of the Revenue Act of 1918, as set forth in Bureau letter dated February 24, 1925.

After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised the Bureau holds that denial of your application under the provisions of Section 328 of the Revenue Act of 1918 is sustained by comparison of your corporation with representative concerns, as nearly as may be similarly circumstanced, as contemplated under the provisions of Section 328 of the statute. Such comparison discloses that no hardship or inequality was suffered by your corporation in the matter of taxes assessed. Accordingly, the conclusions set forth in the above-mentioned letter are sustained.

Your case is, therefore, deemed closed.

A copy of this communication has been forwarded to your authorized representative, Mr. Arthur Rothstein, 120 Broadway, New York, New York.

Respectfully, ——— ———, Deputy Commissioner.

md-1.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR JUDGMENT—Jan. 16, 1930

The issues in this action having come on for trial and said issues having been tried before the Court without the intervention of a jury, pursuant to written stipulation filed with the Clerk of this Court pursuant to the provisions of Section 649 of the United States Revised Statutes, and the Court having duly made its decision in writing

Now on motion of Charles H. Tuttle, United States Attorney, appearing as attorney for the defendant, it is hereby

[fol. 18] Ordered that the defendant, Charles W. Anderson, individually and as Collector of Internal Revenue for the Third District of New Cork, have and recover judgment against the plaintiff, Daniel Reeves, Inc., dismissing the complaint herein upon the merits; and it is further

Ordered that the Clerk of the Court be and he is hereby directed to make and enter such judgment accordingly, together with the costs and disbursements of this action.

Julian W. Mack, Circuit Judge.

IN UNITED STATES DISTRICT COURT

DANIEL REEVES, INC., Plaintiff,

against

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue for the Third District of New York, Defendant

JUDGMENT

The above entitled action having been brought on to trial at the Woolworth Building, Borough of Manhattan, City [fol. 19] of New York, before the Hon. Julian W. Mack, a jury having been duly waived by stipulation in writing pur-

suant to Section 649 of the United States Revised Statutes, and the parties having entered into and submitted a stipulation in writing, setting forth all of the facts upon which the respective parties relied in support of their respective positions, and the plaintiff having heretofore made a motion for judgment on the pleadings herein and on said motion, the Court having on November 13, 1929 delivered an opinion upon questions of law identical with those raised upon the trial, and the Court having made special findings of fact and conclusions of law which were filed with the Clerk of the Court on the 21st day of January, 1930, and having incorporated its said opinion of November 13, 1929 in its decision which directed that the defendant have judgment against the plaintiff dismissing the complaint on the merits, which was filed with the Clerk of the Court the 21st day of January, 1930, and an order of the Court directing that a judgment be entered in favor of defendant and against plaintiff dismissing the complaint on the merits, having been filed on January 21, 1930, it is hereby

Ordered, Adjudged and Decreed that the defendant have judgment against the plaintiff dismissing the complaint on the merits, together with costs as taxed in the sum of $30.00.

Judgment signed and filed this 6th day of March, 1930.

(Signed) Alex Gilchrist, Jr., Clerk.

[fol. 20] In United States District Court

[Title omitted]

Stipulation Waiving Jury Trial

It is hereby stipulated and consented by and between the parties hereto acting by and through their respective attorneys that this action may be tried by the Court without intervention of a jury, a jury being hereby waived, pursuant to Section 649 of the United States Revised Statutes.

The parties shall join in requesting the Court in determining the controversy to make a decision in which the Findings of Fact shall be special and which the Court shall make its separate conclusions of law. This Court shall be

requested to pass upon any proposed Conclusions of Law submitted by either party.

Dated New York, January 16, 1930.

Herman Goldman, Attorney for Plaintiff. Charles H. Tuttle, Attorney for Defendant.

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FACTS

It is hereby stipulated, conceded and agreed by and between the respective parties hereto, acting by and through their respective attorneys, that for the purposes of the trial of this action only the following are the facts:

First. The plaintiff was and at all the times from January 1, 1919, to and including October 26, 1928, a corporation duly organized under the laws of the State of New York, having its principal place of business in the City of New York, State of New York.

Second. During the period between about March 11, 1920, and about August 15, 1921, one William H. Edwards was duly appointed and qualified as Collector of Internal Revenue of the United States of America for the Third District of New York.

Third. From and after April 1, 1923, and up to and in-
[fol. 22] cluding the date of this action, the defendant was the duly appointed and qualified Collector of Internal Revenue of the United States of America for the Second District of New York.

Fourth. On or about March 11, 1920, plaintiff duly filed with said William H. Edwards, then Collector of Internal Revenue of the United States of America, for the Second District, its income and profits tax report for the year ended December 31, 1919, in accordance with the Revenue Acts of the United States then in effect, and during the period between about March 15, 1920, and December 15, 1920, paid to the said William H. Edwards, as such Col-

lector, various sums of money aggregating $80,479.75, which the plaintiff in good faith believed to be the entire amount for which it was liable to the United States of America, or any of its departments or offices for income and profits tax for the year ended December 31, 1919.

Fifth. On or about April 5, 1924, plaintiff received from the defendant as Collector of Internal Revenue as aforesaid a bill and demand for payment of an additional assessment of $1,886.79, claimed by the defendant to be due from the plaintiff as an additional income and excise profits tax for the year 1919.

Sixth. Thereafter and at or about November 14, 1925, the defendant collected from the plaintiff the sum of $2,061.31 claimed by the defendant to be due from the plaintiff to the defendant as additional income and profits tax for the year ended December 31, 1929.

Seventh. The plaintiff paid to the defendant the sum so collected under protest and involuntarily and under duress.

[fol. 23] Eighth. No proceedings for the collection of said additional assessment and said sum of money were had or taken against the plaintiff between March 11, 1920, and November 14, 1925, nor within five years from the date of filing of plaintiff's aforesaid report of income and profits tax for the year 1919.

Ninth. On or about April 27, 1927, plaintiff duly applied in writing to the Commissioner of Internal Revenue of the Treasury Department of the United States for the refund of said additional amount by filing with the defendant on said date a claim for refund on the ground that said additional assessment was illegal and wrongfully collected in that proceedings for the collection thereof were not had or taken within the period between March 11, 1920, the date when the report of income and profits tax of the plaintiff was filed for 1919, and November 14, 1925, the date the aforesaid additional amount was collected by the defendant, or within five years after the filing by the plaintiff of its income and profits tax return for the year ended December 31, 1919.

Tenth. On or about November 7, 1927, plaintiff received from the Commissioner of Internal Revenue of the Treas-

ury Department of the United States notice, dated November 5, 1927, that its claim for refund for said additional amount and said sum of $2,061.31 was rejected, and neither said amount so collected, nor any part thereof has been repaid to the plaintiff and the defendant refuses to pay the same to the plaintiff.

Eleventh. Plaintiff filed its aforesaid report of its income and profits tax for the year ended December 31, 1919, [fol. 24] in entire good faith and there was no fraud or element of fraud in connection therewith.

Twelfth. On or about January 25, 1924, there was written to the plaintiff from the office of the Commissioner of Internal Revenue a letter, a copy of which is annexed to the answer as Exhibit A and made a part thereof.

Thirteenth. The additional assessment in the sum of $1,886.79 was made in the month of March, 1924.

Fourteenth. On or about April 16, 1924, plaintiff filed a claim for abatement in the sum of $1,886.79, a copy of which is annexed to the answer as Exhibit B and made a part thereof.

Fifteenth. Subsequent to the filing of the said claim for abatement no action or proceeding to collect said additional sum of $1,886.79 was taken and proceedings for the collection thereof were held in abeyance and administrative action for collection was withheld and delayed.

Sixteenth. On or about September 28, 1925, after the submission of briefs and oral argument in support of said claim for abatement there was written to the plaintiff from the office of the Commissioner of Internal Revenue a letter, a copy of which is annexed to the answer and marked Exhibit C and made a part thereof.

Seventeenth. The plaintiff did not file any bond in connection with the aforesaid claim in abatement.

Eighteenth. The plaintiff did not enter into any agreement or stipulation pursuant to which the collection of the [fol. 25] aforesaid additional amount or assessment was delayed or postponed.

Nineteenth. The plaintiff did not enter into any agreement, stipulation or paper writing extending or waiving the period of limitations within which the aforesaid additional amount or additional assessment might be collected from it.

Twentieth. No agreement, stipulation or waiver between the plaintiff and any representative of the Government of the United States require the holding in abeyance of proceedings for collection, or the withholding and delaying of administrative action for the collection of said additional assessment nor was such holding in abeyance, withholding and delay required by the terms of any injunction, order, decree or mandate issued by any court.

It is hereby further stipulated that upon the foregoing facts this action may be tried by this Court without a jury, a jury being hereby waived, pursuant to the provisions of Section 649 of the United States Revised Statutes.

The parties shall join in requesting the Court in determining the controversy to make a decision in which the facts hereinbefore stipulated shall be incorporated as the Court's Findings of Fact and in which the Conclusions of Law upon which the decision is based may be specified, and to pass upon any proposed Conclusions of Law submitted by either party.

Dated New York, January 16th, 1930.

Herman Goldman, Attorney for Plaintiff. Charles H. Tuttle, Attorney for Defendant.

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECISION

The above entitled action having been brought on to trial at the Woolworth Building, Borough of Manhattan, City of New York, before me, a jury having been duly waived by stipulation in writing pursuant to Section 649 of the United States Revised Statutes, and the parties having entered into and submitted a stipulation in writing, setting forth all of the facts upon which the respective parties relied in

support of their respective positions, and the plaintiff having heretofore made a motion for judgment on the pleadings herein and on said motion, the Court having delivered an opinion upon questions of law identical with those raised upon the trial, I do hereby find as follows, incorporating said opinion in this decision:

Findings of Fact

I do hereby find as facts each and every fact set forth in said stipulation which is dated January 16, 1930, and do [fol. 27] hereby incorporate herein as found the said stipulation with the same force and effect as if the facts therein set forth were here repeated.

Conclusions of Law

First. The laws of the United States in force and effect on November 14, 1925, prohibited the defendant from collecting from the plaintiff the sum of $2,061.31, or any part thereof on said date.

Second. The collection by the defendant of the said sum of $2,061.31 on November 14, 1925, constituted an illegal collection.

Third. On November 14, 1925, and immediately thereafter the plaintiff had a good and substantial cause of action against the defendant for the recovery of the sum of $2,061.31 with interest thereon from November 14, 1925.

Fourth. The complaint herein states facts sufficient to constitute a cause of action against the defendant for the relief demanded in the complaint and the facts contained in the stipulation and hereinbefore found adequately support the allegations in the complaint.

Fifth. The delay of the defendant in the collection of the aforesaid additional assessment or sum after the filing by the plaintiff of its claim in abatement constituted a stay of said collection.

Sixth. By reason of the enactment of Sections 607 and 611 of the Revenue Act of 1928 and by reason of the filing [fol. 28] by the plaintiff of its claim for abatement and by virtue of the delay by the defendant in making collection of

said tax after the filing of said claim for abatement the plaintiff is precluded from recovering the amount collected by the defendant from the plaintiff on November 14, 1925, or any part thereof, or interest thereon, and the aforesaid facts enumerated in this conclusion constitute a defense and bar to the cause of action set forth in the complaint.

Seventh. Said Section 611 of the Revenue Act of 1928 is constitutional and the effect herein given to it as a defense and bar against the cause of action alleged in the complaint does not result in a deprivation of plaintiff of its property without due process of law in contravention of the provisions of the Fifth Amendment of the Constitution of the United States.

Eighth. Section 611 of the Revenue Act of 1928 is constitutional and does not constitute a delegation to the several Collectors of Internal Revenue of the legislative power conferred upon Congress by Section 8 of Article 1 of the Constitution of the United States to lay and collect taxes, duties, imposts and excises.

Ninth. Section 611 of the Revenue Act of 1928 constitutes a ratification by the Congress of the collection by the defendant from the plaintiff of the said additional sum or assessment made on November 14, 1925.

Tenth. The provisions of the several Revenue Acts adopted by the Congress prior to the year 1926, which pro- [fol. 29] vide the periods after the filing of reports of income and profits taxes within which collections thereof or on account thereof might be made, were statutes of repose only and resulted only in the bar of the right of the collector to make collections of taxes after the expiration of said periol but did not extinguish the liability of the taxpayers to pay the tax.

Eleventh. Section 1106 (a) of the Revenue Act of 1926 by reason of the repeal thereof as of the date of its enactment by Section 612 of the Revenue Act of 1928 did not operate to extinguish the liability of the plaintiff to pay said additional sum or assessment which was collected on November 14, 1925.

Twelfth. The affirmative defense alleged in the answer herein states facts sufficient to constitute a good and complete defense to the cause of action alleged in the complaint and the facts contained in the stipulation and hereinbefore found adequately support the allegations in the said affirmative defense.

Thirteenth. The defendant is entitled to judgment dismissing the complaint on the merits. I direct judgment accordingly.

Dated January 16, 1930.

Julian W. Mack.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S EXCEPTIONS

The plaintiff above named hereby excepts to the decision herein by Hon. Julian W. Mack, Circuit Judge, made herein on or about January 16, 1930, and filed on or about said date in the office of the Clerk of this Court in the following particulars:

To the conclusions of law contained in said decision and numbered "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Tenth", "Eleventh", "Twelfth" and "Thirteenth" and each and every part of said conclusions.

Dated New York, January 16, 1930.

Yours, etc., Herman Goldman, Attorney for Plaintiff. Office & P. O. address: 120 Broadway, Borough of Manhattan, City of New York.

[fol. 31] To Charles H. Tuttle, United States Attorney, Attorney for Defendant, United States Post Office and Court Building, Borough of Manhattan, City of New York; Clerk of the District Court of the United States for the Southern District of New York.

In United States District Court

[Title omitted]

Stipulation and Order Settling Bill of Exceptions

It is hereby stipulated and agreed that the foregoing contains all the testimony and exceptions made at the trial of [fol. 32] this case, and that the same may be settled and ordered on file as the bill of exceptions herein.

Herman Goldman, Attorney for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

Upon the foregoing stipulation, it is

Ordered that the foregoing may be settled and ordered on file as the bill of exceptions herein.

Dated New York, April 3rd, 1930.

Julian W. Mack, U. S. C. J.

[fol. 33] In United States District Court

Opinion

At Law. Actions by Regla Coal Company, by Philip S. Arthur, by the Homer Brooke Glass Company, and by Robins Conveying Belt Company against Frank K. Bowers, and by Daniel Reeves, Inc., against Charles W. Anderson. Judgment in accordance with opinion.

Herman Goldman, of New York City (Elkan Turk and Arthur Rothstein, both of New York City, of counsel), for plaintiffs.

Charles H. Tuttle, U. S. Atty., of New York City (Walter H. Schulman, of New York City, of counsel), for defendants.

Mack, Circuit Judge:

Motions for judgment on the pleadings in five cases. The facts as alleged in the complaint and admitted in the answer

in the Regla Company Case raise the identical legal questions involved in each of the other cases.[1]

In the Regla Case plaintiff, on May 1, 1918, filed its income and excess profits tax return for the fiscal year ending June 30, 1917, and was duly assessed and paid the sum of $6,867.94 as taxes for that year. On April 18, 1923, it received a bill for an additional assessment of $16,679.80; it appealed to the Special Assessment Section of the Income Tax Unit at Washington, and as part of the appeal, on April 26, 1923, filed a claim for the abatement of these taxes. [fol. 34] No further proceedings to collect the taxes were taken until May 28, 1924, when defendant collected $7,194.44 additional taxes. Three years later, on April 27, 1927, plaintiff's application for a refund was refused (except as to a sum of $220.40 refunded as an over-assessment). As defendant took no further action within the statutory period of six months (26 U. S. C. § 156 [26 U. S. C. A. § 156], plaintiff brought the present suit on January 17, 1928, to recover the balance of $6,974.04. The pertinent statutes are set forth in the margin.[2]

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[1] There are certain minor, immaterial differences: In the Arthur Daniel Reeves, Inc., and Robins Conveying Company Cases, plaintiffs received letters from the Commissioner stating that an immediate assessment would be made, but that the Income Tax Bureau would entertain a claim in abatement if filed within a specified time; (b) in the Arthur Case, a part of the claim for abatement was allowed; (c) in the Brooke Glass Company and Daniel Reeves, Inc., Cases, the Commissioner definitely refused the application for a refund instead of merely taking no action thereon within the statutory six months prior to suit. 26 U. S. C. § 156 (26 U. S. C. A. § 156).

[2] Revenue Act of 1918:

"Sec. 250. * * * (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was

Plaintiff contends that: (1) The collection of May 28, 1924, was wholly illegal under the statutes then in force because made more than 5 years after the date of the original return; (2) they have a common-law right to recover the money thus collected; (3) recovery is not barred because of Sections 607 and 611 of the Revenue Act of 1928 (26 U. S. C. A. §§ 2607, 2611), since that act is inapplicable be- [fol. 35] cause (a) a formal stay of collection is necessary under Section 611 and (b) the act created merely a new status of overpayor and was not intended to destroy the right to recover taxes illegally collected; (4) if Sections 607 and 611 of the Act of 1928 (26 U. S. C. A. §§2607, 2611) are to be construed as destroying this right, they are unconstitutional as constituting a deprivation of property without due process of law and as an improper delegation of the federal taxing power to the collector.

Defendant contends that (1) as a measure of curative expediency, Congress has the constitutional power, without depriving a taxpayer of his property without due process of law, to remove the bar of a statute of limitation on tax collection, which, as an act of grace, it had previously enacted for the repose of the taxpayer; (2) the intent of

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made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due." 40 Stat. 1083.

Revenue Act of 1926:

"Sec. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax." 44 Stat. 113, 26 U. S. C. § 1249 note (26 U. S. C. A. § 1249 note).

Congress in passing Sections 607 and 611 was to remove the bar of the existent statute of limitations as a defense or [fol. 36] as a cause of action, and to legalize collections made more than five years after the filing of returns in all cases where consideration of claims for abatement of duly assessed taxes delayed collection until after the five-year period of limitation on collection had expired.

[1] Under Section 250(d) of the Revenue Act of 1921 (42 Stat. 265) it is clear that the collection of the $16,679.80 was barred on May 1, 1923, five years after the date of the original return, and that on May 28, 1924, when this sum was actually collected from plaintiff, defendant was without authority to enforce collection either by distraint or suit. Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676. Accordingly, plaintiff is entitled to judgment unless Sections 607 and

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Revenue Act of 1928:

"Sec. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." 45 Stat. 874, 26 U. S. C. § 2607 (26 U. S. C. A. § 2607).

"Sec. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." 45 Stat. 875, 26 U. S. C. 2611 (26 U. S. C. A. § 2611).

"Sec. 612. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926." 45 Stat. 875.

611 of the Revenue Act of 1928 (26 U. S. C. A. §§ 2607, 2611) may be construed as barring such collection, and, further, unless those sections, so construed, are constitutional.

2. In my judgment, Section 611 of the Act of 1928 is applicable to the cases at bar. In all of them the assessments in question were made prior to June 2, 1924; claims for abatement were filed by the taxpayer (in three of them at the invitation of the Commissioner); and pending decisions on such claims, the collector made no attempt whatever to collect the taxes within the time remaining before the statutory bar would fall. But plaintiff, in reliance on the case of United States v. Burden, Smith & Co., 33 F. (2d) 229, 230 (C. C. A. 5th), followed in Cutcheon v. Rafferty (D. C. E. D. N. Y.), 34 F. (2d) 708, decided July 15, [fol. 37] 1929, and Pepsin Syrup Co. v. Schwaner (D. C. S. D. Ill.), 35 F. (2d) 197, decided July 20, 1929, contends that the words "and if the collection * * * was stayed," in Section 611 (26 U. S. C. A. § 2611) require some form of compulsory stay binding upon the collector. In the Burden, Smith & Co. Case the Court decided that "stayed", in a legal sense, is not interchangeable with "delayed", and necessarily connotes "some act on the part of the taxpayer which would morally or legally tie the hands of the Commissioner and prevent collection of the tax"; and since Article 1032 of Regulation 62 of the Income Tax Bureau specifically provides that the filing of a claim for abatement did not of itself operate as a suspension of collection, the Court held that some kind of formal stay is necessary within Section 611 of the Act of 1928 (26 U. S. C. A. § 2611).

[2-4] With all due respect, I have been unable to concur in this conclusion, and, in this district, am not bound to accept it. While taxing statutes are to be interpreted liberally in favor of the taxpayer, particular revenue acts which complement existing statutes must be interpreted with reference to such earlier acts and in the light of conditions resulting from their interpretation and administration. Section 611 of the Act of 1928 (26 U. S. C. A. § 2611) cannot be construed to contemplate a judicial stay of collection, for it has long been settled that such an injunction will not issue (Rev. St. § 3224, 26 U. S. C. § 154 [26 U. S. C. A. § 154] even against collections after the statutory period.

Ellay Co. v. Bowers, 25 F. (2d) 637 (C. C. A. 2d). Plaintiff contends, however, that a compulsory stay binding on the Bureau and the collector, similar to that formerly pro-
[fol. 38] vided in Section 279 of the Revenue Act of 1924 (43 Stat. 300, see 26 U. S. C. A. § 1063, historical note), must have been intended. But as pointed out by Judge Dawson in Wright & Taylor, Inc. v. Lucas (D. C. W. D. Ky.), 34 F. (2d) 328, 332, decided July 26, 1929, Section 611 (26 U. S. C. A. § 2611), by its express terms, deals with taxes assessed prior to June 2, 1924, which was the effective date of the Revenue Act of 1924. Accordingly, it seems necessary to examine the provisions of statutes enacted prior to that date relating to claims for the abatement of taxes. The only act making provision for such claims is that of 1918, in which paragraph 14 of Section 234 (40 Stat. 1079) authorizes a taxpayer at the time of filing his return to file a claim in abatement, provides that payment should not be required until such claim is passed upon; but the taxpayer must file a proper bond. This section was thus the only provision in any of the prior revenue acts which fell within the specific terms of Section 611 of the Act of 1928 (26 U. S. C. A. § 2611).

The 1918 act, however, required that a claim for abatement be accompanied by a bond; Section 611 of the Act of 1928, by its express terms, is applicable, irrespective of whether or not a bond accompanied the claim. Moreover, while the Act of 1918 was the only statute prior to 1924 which made provision for a claim and formal stay, the Commissioner of Internal Revenue has had authority to abate or refund taxes illegally assessed throughout the period under review. See 26 U. S. C. A. § 149, historical note. And pursuant to statutory authority, the Commissioner, with the approval of the Secretary of the Treasury, [fol. 39] promulgated regulations which included provisions for the filing of claims in abatement. In none of them, however, was the execution of a bond required, or was there a mandatory provision that collection must be stayed pending decision on the claim in abatement. On the contrary, it was provided that the filing of a claim in abatement did not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax

being jeopardized by the running of the statute or otherwise. See Article 261, Regulation 33; Article 1032, Regulation 45; Article 1032, Regulation 62; cf. United States v. Burden, Smith & Co. (C. C. A.), 33 F. (2d) 229, 230. Under these regulations, the collector had authority to postpone the collection of the tax pending the determination of the claim for abatement, unless, in his judgment, such action would jeopardize the ultimate collection of the tax. Postponement was the common practice where there was no doubt as to the solvency of the taxpayer; in many cases the period of the statutory bar on collection expired before the decision on the claim in abatement had been rendered. See H. R. Rep. No. 2, 70th Cong. 1st Sess., page 34; H. R. Doc. No. 578, 69th Cong., 2d Sess., page 3, et seq. This was because prior to Bowers v. New York & Albany Lighterage Co., 273 U. S. 346; 47 S. Ct. 389; 71 L. Ed. 676, the Bureau believed that the limitation provisions did not apply to distraints, and that therefore the collection was not in fact jeopardized.

Following the decision in the Albany Lighterage Case, a large number of taxpayers in the situation of the present [fol. 40] plaintiffs, who had failed to have their assessments abated and who had been forced to pay under threat of distraint, sought to secure refunds on the ground that the taxes had been illegally collected. It was to meet this situation that the present Section 611 (26 U. S. C. A. § 2611) was drafted; its purpose is clearly set forth in the report of the Ways and Means Committee in presenting the bill to the House:

"Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which

the period for assessment expired prior to the enactment of the 1924 Act, that the period of collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

"Your committee appreciates the fact that this provi- [fol. 41] sion will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax l-ability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment." H. R. Rep. No. 2, 70th Cong., 1st Sess., page 34; see also Sen. Rep. No. 960, 70 Cong., 1st Sess., page 42.

That Section 611 (26 U. S. C. A. §2611) was intended to include more than those cases in which a formal claim in abatement and bond had been filed is further indicated in the light of the inapplicability of the time limitation to the liability on the bond. See United States v. John Barth Co., 279 U. S. 370, 376; 49 S. Ct. 366; 73 L. Ed. 743.

In view of the prior legislation, the departmental regulations and practice thereunder, and the statements in the Committee reports, I am entirely clear that Section 611 should be construed as applicable to those cases in which the filing of a claim in abatement had in fact resulted in an administrative delay in collecting duly assessed taxes, even though no formal "stay" had been granted.

[5, 6] 3. I come then to a consideration of the constitutionality of Section 611 as applied to the cases at bar. It is well settled that Congress has the power to ratify, by sub-

[fol. 42] sequent legislation, an unauthorized and illegal tax collection so as to give it retroactive validity. United States v. Heinszen & Co., 206 U. S. 370; 27 S. Ct. 742; 51 L. Ed. 1098; 11 Ann. Cas. 688; Rafferty v. Smith, Bell & Co., 257 U. S. 226; 42 S. Ct. 71; 66 L. Ed. 208. But plaintiff insists that this power is conditioned both upon the power of Congress at the time of the unauthorized collection to lay the tax and upon an unequivocal manifestation of the legislative intent to ratify the unauthorized collection. It is urged that Section 611 evidences no such intent, that in any event, after the statutory bar has fallen, the taxpayer has a vested right to recover the taxes, and that to deprive him of this right constitutes a taking of property without due process of law.

In my judgment, an examination of the three pertinent sections of the Act of 1928 sufficiently indicates the intent to ratify the illegal collection and to prevent the return of taxes properly assessed, and, but for the limitation act, otherwise valid and due. Section 612 repeals as of its original date of enactment Section 1106 (a) of the Revenue Act of 1926 which specifically provided that the running of the statute should extinguish the right as well as bar the remedy. Section 607 (26 U. S. C. A. §2607) provides that in the ordinary case of payment after the statute has run, such payment shall be considered an overpayment and refunded or credited as such. Section 611 (26 U. S. C. A. § 2611) exempts from the operation of Section 607 cases, such as those at bar, in which a claim in abatement had been filed and collection delayed. While no express mention is made of ratification, a reading of these three sections in the light of their [fol. 43] purpose, as above stated, makes it abundantly clear that Congress intended to give to the collections already made (or to be made within a year) whatever validity it was empowered to give.

Contrary to Clinton Iron & Steel Co. v. Heiner (D. C.), 30 F. (2d) 542, relied on by plaintiff, I agree with the views expressed by Judge Dawson in Wright & Taylor, Inc., v. Lucas, supra, as follows:

"There is no merit in the plaintiff's suggestion that Section 611 is only an inhibition against the Commissioner of Internal Revenue making refunds in such cases, but that it has no application in a suit against a collector such as the

one here. Such a construction of this section would lead to an unconscionable result. When he collected the tax, the collector was required by law to immediately pay same into the Treasury. He had no right to retain the money pending the outcome of threatened litigation over the collection. The government has had the benefit of the collection. Yet, if the plaintiff's theory is correct, Congress intentionally left collectors open to suit and judgment in such cases as the one at bar * * *. It seems to me that the mere suggestion of the result of such a construction forces us to reject it."

To hold that the Commissioner is prohibited from making refunds, but that the collector may nevertheless be sued, would produce an anomalous situation, in view of the decisions that, though in form such suit is against the collector, in substance it is an action against the United States within the Tucker Act (24 Stat. 505). United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28; 32, 35 S. Ct. 499; 59 L. Ed. 825.

[fol. 44] [7] Plaintiff's final contention that, inasmuch as the statute had run at the time of the collection, Congress was then and is still without the constitutional power to remove the bar, cannot be sustained. It is well settled that there is no vested right to rely upon a statute of limitation to defeat a debt or other personal obligation; the Legislature which imposed the bar may remove it. Campbell v. Holt, 115 U. S. 620; 6 S. Ct. 209; 29 L. Ed. 483; cf. Decker v. Pouvailsmith Corp., N. Y. Ct. App., decided October 15, 1929, reported in 252 N. Y. 1; 168 N. E. 442. That because of sovereign grace the expiration of the statutory period not only gave the taxpayer a defense, but also a right to recover taxes paid thereafter, does not, in my judgment, change the result. Nor is this a case like Davis v. Mills, 194 U. S. 451; 24 S. Ct. 692; 48 L. Ed. 1067; or Danzer & Co. v. Gulf & S. I. R. R. Co., 268 U. S. 633; 45 S. Ct. 612; 69 L. Ed. 1126; in which the grant of a right is conditioned upon its being exercised within a prescribed period; for the right of the United States to these taxes existed prior to and independent of the grant of a limitation statute for the repose of the taxpayer. The result is identical with that reached by the Circuit Court of Appeals for the Ninth Circuit in Hunt-

ley v. Gile, 32 F. (2d) 857, and by Judge Dawson in Wright & Taylor, Inc. v. Lucas, supra, in both of which cases the constitutionality of Section 611 (26 U. S. C. A. §2611) was sustained.

No injustice to the taxpayer results from such construction. The purpose of the limitation statute was to protect the taxpayer against the assertion of stale governmental [fol. 45] claims at a time when most of the evidence bearing on the correctness of the assessment would have been lost. This purpose is certainly satisfied where, as here, the evidence relating to the assessment has been preserved in the claim for abatement.

[8] 4. The objection that Section 611 is unconstitutional, because it leaves to the collector the arbitrary power to determine whether or not to collect the tax and thereby prevent the taxpayer from recovering it, cannot be sustained. The section specifically covers payments (which includes collections) made within one year after its enactment. As held in Ellay Co. v. Bowers, supra, such collection cannot be enjoined, and, by virtue of Section 611, once the money has been collected, it may not be recovered solely because it was collected after the statutory period. That some taxpayers may escape because the collector does not act within the one-year period is beside the point; it must be assumed that the executive department of the government will act with due diligence.

Since the hearing on these motions for judgment on the pleadings, the precise question involved has been passed upon in this court in Laura H. Jennings v. Anderson, decided October 11, 1929. In that case Judge Grubb directed a verdict in favor of the plai-tiff taxpayer, but filed no opinion. While ordinarily the rule of comity would require me to follow Judge Grubb's decision, in view of the fact that he rendered no opinion in the case, and that he may perhaps have felt to some extent bound by the views of the Circuit [fol. 46] Court of Appeals of his home circuit (United States v. Burden, Smith & Co., supra), and in consideration, too, of the importance of the question presented, I have deemed it my duty, sitting in this Court, briefly to state my own views and conclusions.

Since the foregoing opinion was dictated, the opinion of the Ninth Circuit Court of Appeals in Goodcell (Millie

Francis Oil Company) v. Graham, 35 F. (2d) 586, filed November 4, 1929, has come to my attention. The foregoing opinion is entirely in accord with that opinion in the interpretation of the word "stay" and in declining to follow United States v. Burden, Smith & Co., supra.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

To the Honorable William Bondy, Judge of the District Court of the United States for the Southern District of New York:

And now comes Daniel Reeves, Inc., the plaintiff in the above entitled cause, and feeling itself aggrieved by the judgment of the District Court of the United States for the Southern District of New York, entered on the 6th day of March, 1930, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and prays that said appeal be allowed and shall act as a supersedeas upon filing good and sufficient surety as required by law. Assignment of errors is filed with this petition.

Daniel Reeves, Inc., by Herman Goldman, Attorney for Petitioner.

The foregoing appeal is hereby allowed upon filing of bond in the sum of $300.

Wm. Bondy, United States District Judge.

[fol. 48] *Duly sworn to by Herman Goldman. Jurat omitted in printing.*

[fol. 49] Citation, in usual form, omitted in printing.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Daniel Reeves, Inc., the plaintiff-in-error, and in connection with its petition for appeal says that in the record, proceedings, order, decision and judgment aforesaid, error has intervened to its prejudice, to wit:

1. The Court erred n refusing to enter judgment herein for the plaintiff-in-error in the sum of $2,061.31, with interest thereon from November 14th, 1925.

2. The Court erred in entering judgment for the defendant herein dismissing the complaint herein upon the merits and awarding the defendant costs in the sum of $30.

3. The Court erred in determinng as a conclusion of law that the delay of the defendant in the collection of the additional assessment or sum after the filing by the plaintiff of its claim in abatement constituted a stay of said collection.

[fol. 51] 4. The Court erred in determining as a conclusion of law that by reason of the enactment of Sections 607 and 611 of the Revenue Act of 1928 and by reason of the filing by the plaintiff of its claim for abatement, and by virtue of the delay by the defendant in making collection of said tax after the filing of the said claim for abatement, the plaintiff is precluded from recovering the amount collected by the defendant from the plaintiff on November 14th, 1925, or any part thereof or interest thereon, and in determining as a conclusion of law that the aforesaid facts enumerated in this assignment of error constitute a defense and a bar to the cause of action set forth in the complaint.

5. The Court erred in determining as a conclusion of law that Section 611 of the Revenue Act of 1928 is constitutional, and that the effect given to it as a defense and a bar against the cause of action alleged in the complaint does not result in a deprivation of the plaintiff of its property without due process of law in contravention of the

provisions of the Fifth Amendment to the Constitution of the United States.

6. The Court erred in determining as a conclusion of law that Section 611 of the Revenue Act of 1928 is constitutional and does not constitute a delegation to the several Collectors of Internal Revenue of the legislative power conferred upon Congress by Section 8 of Article I of the Constitution of the United States to lay and collect taxes, duties, imposts and excises.

7. The Court erred in determining as a conclusion of law that Section 611 of the Revenue Act of 1928 consti- [fol. 52] tutes a ratification by Congress of the collection by the defendant from the plaintiff of the additional sum or assessment made on November 14th, 1925.

8. The Court erred in determining as a conclusion of law that the provisions of the several Revenue Acts adopted by Congress prior to the year 1926, which provide the periods after the filing of reports of income and profits taxes within which a collection thereof or on account thereof might be made, were statutes of repose only and resulted only in the bar of the right of the Collector to make collections of taxes after the expiration of said period but did not extinguish the liability of the taxpayer to pay the tax.

9. The Court erred in determining as a conclusion of law that Section 1106 (a) of the Revenue Act of 1926, by reason of the repeal thereof as of the date of its enactment by Section 612 of the Revenue Act of 1928, did not operate to extinguish the liability of the plaintiff to pay said additional sum or assessment which was collected on November 14th, 1925.

10. The Court erred in determining as a conclusion of law that the affirmative defense alleged in the answer in this action states facts sufficient to constitute a good and complete defense to the cause of action alleged in the complaint and in determining that the facts contained in the stipulation of facts and found in the decision adequately support the allegations in said affirmative defense.

[fol. 53] 11. The Court erred in making the conclusion of law herein numbered Fifth.

12. The Court erred in making the conclusion of law herein numbered Sixth.

13. The Court erred in making the conclusion of law herein numbered Seventh.

14. The Court erred in making the conclusion of law herein numbered Eighth.

15. The Court erred in making the conclusion of law herein numbered Ninth.

16. The Court erred in making the conclusion of law herein numbered Tenth.

17. The Court erred in making the conclusion of law herein numbered Eleventh.

18. The Court erred in making the conclusion of law herein numbered Twelfth.

19. The Court erred in making the conclusion of law herein numbered Thirteenth.

Wherefore said plaintiff-in-error prays that said judgment of the District Court of the United States for the Southern District of New York may be set aside, reversed and held for naught.

Herman Goldman, Attorney for Petitioner. Office & P. O. address: 120 Broadway, Borough of Manhattan, City of New York.

[fol. 54] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed upon by the parties.

Dated New York, April 3rd, 1930.

Herman Goldman, Attorney for Plaintiff. Charles H. Tuttle, U. S. Attorney, Attorney for Defendant.

[fol. 55] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56] In United States Circuit Court of Appeals for the Second Circuit

Daniel Reeves, Inc., Appellant,

against

Charles W. Anderson, Individually and as Collector of Internal Revenue for the Third District of New York, Appellee

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeal by the plaintiff from a judgment of the District Court for the Southern District of New York dismissing a complaint in an action at law to recover income and profits taxes, paid under duress.

Elkan Turk for the appellant.
Walter H. Schulman for the appellee.

Opinion

L. Hand, Circuit Judge:

The taxpayer filed its return for 1919 on March 11, 1920, and during the year paid the taxes disclosed. The commissioner assessed a deficiency in March, 1924; the collector made demand for it on April 5, 1924; the taxpayer filed a claim for abatement on the sixteenth of that month. There matters rested without change until September 28, 1925, when the claim was rejected and on November 15, 1925, the [fol. 57] taxpayer paid the deficiency with interest under threat by the collector. After proper preliminary steps this suit was brought against the collector in November, 1927. The question is whether the delay in collecting the tax from March 11, 1920, the date of the return, to November 14, 1925, made the collector's act a tort on which a cause of action arose for money had and received.

In spite of the extraordinary differences in judicial opinion which the situation has evoked,—differences which only the Supreme Court can eventually settle,—the underlying facts are not complicated. Section 250 (d) of

the Revenue Act of 1918 set a limitation of five years after return upon the Commissioner's power to "determine and assess" the amount of the tax. The same section in the Act of 1921 reduced the period to four years, but kept it at five as to assessments under the Act of 1918. Until 1924 the Treasury had no longer period within which to collect taxes through the courts, then to assess them, so that if the Commissioner assessed the tax on the last day of the proper period, he could begin no "suit or proceeding in court" to collect it. He had not in practise paid much attention to this feature of the law because he supposed until February, 1927, that he had power for an indefinite time after assessment to distrain, and this was ordinarily remedy enough. The decision of the Supreme Court in Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, which held [fol. 58] that distress was barred along with "suits and proceedings," disappointed this assurance and there was thereafter no way to collect, once the time to assess had expired. Sections 607 and 611 of the Act of 1928 were passed after this decision; the first made the assessment or payment of any tax after the period of limitation had expired an "overpayment" and gave the taxpayer a "credit or refund" for it, thus leaving matters as they had been, except to repeal section 1106 (a) of the Act of 1926. The second section excepted from the operation of the first all taxes assessed before the Act of 1924 went into effect, upon condition that the taxpayer had filed a claim for abatement which had stayed collection.

The distinction was a fair one. Section 278 (d) of the Act of 1924 had given the Treasury six years after assessment to collect, and while it took until January, 1929, finally to settle it that this applied only to assessments made after June 2, 1924, the effective date of the Act of 1924, (Russell v. U. S. 278 U. S. 181), that had apparently been already divined as a possibility. So it followed that while the Treasury had six years after assessment to collect taxes assessed after June 2, 1924, it had only four or five years from the return as to all assessed theretofore. Although the Commissioner had misconceived the law as to these, Congress made no effort to reclaim them by reimposition; the delay remained a final bar. Only in case the taxpayer had positively caused the Treasury's inaction by demanding a rehearing, was his advantage taken from him.

Congress refused to convert indulgence into immunity; certainly nothing could be more reasonable. We have only to determine whether the plan conceived in this spirit has miscarried.

[fol. 59] Specifically the arguments by which this exemption is sought to be secured are first, that collection was not "stayed" by the claim for abatement. If by this is meant that the claim raised no legal bar to collection, the argument is unanswerable; it did not. So far as we can discover no statute before 1924 gave such an effect to a claim for abatement except section 234 (a) (14) of the Act of 1918. This had to be filed with the return and not in response to an assessment, and was limited to inventory losses and rebates. Section 611 certainly did not refer to these. Section 279 of the Act of 1924 did indeed provide for a compulsory stay of collection, but only in the case of jeopardy assessments levied under section 274 (d) of that act. Aside from the limited scope of this section, it did not reach the only assessments touched by section 611, those levied before June 2, 1924. Thus, if we construe "stayed" to mean a legal bar, we should give the section no scope whatever. Patently it must refer to those cases in which the collector did not proceed with enforcement while the Commissioner was engaged in passing upon the claim for abatement; such a stay has in practise been recognized as ancillary to the Commissioner's power to remit, (Title 26, Sec. 149, U. S. Code). Had he insisted upon collection before disposing of the claim, the taxpayer would with some justice have been vocal in protest. It is ungenerous now to complain that he did not do so.

[fol. 60] Next, the plaintiff says that if "stayed" means a voluntary stay, the record must show that the claim was the cause of it, and does not. The assessment was collectible as soon as made; no effort was in fact made to collect it till the claim was disposed of; the sequence of the two suggests a causal relation between them. Moreover, to suppose that the collector meanwhile withheld action for any other reason than because his collection might turn out to be unwarranted, is to assume that he was slack in his duty; we are entitled to assume the opposite. Article 1032 of Regulations 45 puts collection in his discretion in such circumstances; his inaction would have been without excuse except for the claim. Regardless of the eventual burden

of proof on the issue, the presumption is that the delay was caused by the claim; and there was no proof to meet it.

The next point demands more attention. The argument runs as follows. Section 607 provides that a tax assessed or paid after the period had expired should be "credited or refunded." Section 611 is merely an exception from this provision; it does not give any right to the Treasury to hold money which it had no right to hold before. Section 607 was passed to be rid of the effect of Section 1106 (a) of the Act of 1926, which had provided that although the expiration of the period of limitation of a tax extinguished the debt, the Commissioner should not credit or refund it unless it was not in fact due when the taxpayer paid it. This section we held not to prevent an action for money had, (Ellay Co. v. Bowers, 25 Fed. (2) 637); it follows that at [fol. 61] that time the taxpayer could have got a "refund" by action, though he could not from the Commissioner. All that section 607 has done is to restore the administrative remedy which section 1106 (a) took away, leaving the taxpayer in possession of all remedies, except against the Commissioner, (§ 611), in cases where he had induced the delay. Since, however, the remedy of an action at law existed all along, and since it did not therefore need any assistance from section 607, section 611 is irrelevant. It was not intended as an affirmative limitation upon preexisting remedies.

This argument is not dependent alone upon the word "refund" in section 607; it has a broader historical basis, and it must be confessed that it is plausible. We think it impossible however so to read section 611 for several reasons. Section 3226 of the Revised Statutes as amended in 1926, (Sec. 1113), requires the filing of a claim for refund or credit as a condition precedent to suit against the collector. It certainly would be an unusual thing to require as a condition precedent an application which by hypothesis could not be granted. But even if we assume that Congress might have wished still to impose the abortive claim for abatement as a condition on the action, the consequences are absurd. Nobody has a claim for refund who has not a possible right of action. The time for presenting the claim is three or four years (Title 26, Sec. 1065), and the time within which to sue is five, (R. S. § 3226), so that the time to file the claim expires first. The effect of section 611, which forbad

[fol. 62] such claims, would only be that taxpayers should not get that cash from the Commissioner which they still could get by way of judgment. It is difficult to conjure any reason which Congress could have had for forbidding the more commodious way of settling such controversies, and still exposing the Treasury to actions at law which must result in exactly the same thing. It would take the strongest possible language to force us to such a conclusion.

The language of section 607 does not go far enough. It makes the taxes described an "overpayment"; that alone was enough to create a cause of action at law, though it was not necessary, as things stood. The second clause in the sentence changed the situation formerly created by section 1106 (a) of the Act of 1926, the effect of which had been to drive the taxpayer to suit. Section 611 enacted that the excepted assessments and payments should "not be considered as an over-payment", and in so doing positively struck the foundation from under any recovery by action, by credit or by refund; it was more than an exception to the second clause of section 607; it dealt with the merits of the recovery as well as with the remedies available.

This disposes of the only questions that seem to us important, for we cannot so regard the argument against the validity of the statute, though it is very earnestly presented. Taxpayers in the plaintiff's position do indeed lose an immunity once acquired; they lose it,—we will assume argu- [fol. 63] endo,—by the mere fiat of the statute; Congress has seen fit in effect to impose the tax upon them de novo at a time long after the events took place on which it depends. This is charged to be in violation of the Fifth Amendment, and so it might be, if there had been no original tax, no claim for abatement, no delay of the Treasury in the disposal of that claim, and a consequent loss of all remedies. Were the Fifth Amendment a remorseless pattern which all legislation must fit, the argument might even so be troublesome; might indeed be conclusive. But constitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction. They are not the rules of a game; their meaning is lost when they are treated as though they were. It is quite true that the section took away a defense from the

plaintiff; he is right to complain unless we can question the kind of defense it was. The moment we do, it must appear to any fair person that he ought not to have it. What the Treasury lost through its procrastination, it lost forever, even though it was under an honest mistake as to its remedies. If the taxpayer did nothing to provoke or encourage its delay, perhaps it was fair that his liabilities once dead should not be revived; there is a deep instinct behind any statute of limitations. But if he asked for recon- [fol. 64] sideration because he had been unlawfully treated, and if his complaint was entertained, then by virtue of an equally deep instinct, it is unfair to allow him to treat that conduct as a fault which he was the means of procuring. He ought not in short to be able to avoid his share of the public burdens, because the authorities consented to give him a considerate hearing. It does not help to call the bar of the statute a vested right; that is at best a figure of speech, which does now hallow everything that is past, a default in pleading as well as a homestead. One's grip on an antagonist, enmeshed in a net of statutes, may be a vested right, but it is not a constitutional right The Supreme Court went much further in United States v. Heinszel, 206 U. S. 370, and Rafferty v. Smith, 247 U. S. 226.

Nor does it make any difference that the Senate struck out the House provision for the future collection of such assessments within a year. The argument is that the tax is not uniform under section eight of Article one of the Constitution, and also apparently that it is discriminatory. As to the second, we can see no reason why Congress should not draw the line between what had been closed and what had not. If the Treasury had for four years or more failed to collect, that might be thought time enough even though the taxpayer had been the cause of the delay; there comes a time to end all things. The whole notion of a limitation involves some discrimination, which in actual incidence must appear, and indeed be, arbitrary. As for section eight [fols. 65 & 66] of Article one it has repeatedly been held to require only territorial uniformity, (The Head Money Cases, 112 U. S. 580, 595; La Belle Iron Works v. U. S., 256 U. S. 377, 392.

We have quite deliberately avoided the citation of those decisions which have hitherto dealt with these questions. Those in the district court are so many and so conflicting

that it would serve no purpose merely to enumerate them. In the Circuit Courts of Appeal at present the plaintiff would win in the Fifth, (U. S. v. Burden, Smith & Co., 33 Fed. (2) 229), and lose in the Ninth, (Huntley v. Gile & Jenks, 32 Fed. (2) 857; Goodcell v. Graham & Foster, 35 Fed. (2) 586). Apparently he would also lose in the Court of Claims, though we have not been favored with the citation in an available form, Gotham Can Co. v. U. S.). So far as the courts have gone, there is therefore a preponderance of authority in favor of the decision below.

Judgment affirmed.

[fol. 67] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

DANIEL REEVES, INC., Plaintiff-Appellant,

v.

CHARLES W. ANDERSON, as Collector, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Filed July 28, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for hearing immediately following case No. 337, Boston Pressed Metal Company vs. The United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SEP 18 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 463

DANIEL REEVES, INC., PETITIONER,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ELKAN TURK,
HERMAN GOLDMAN,
Counsel for Petitioner.

(35,385)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 463

DANIEL REEVES, INC. (PLAINTIFF-APPELLANT BELOW), PETITIONER,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK (DEFENDANT-APPELLEE BELOW), RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of DANIEL REEVES, INC., a corporation organized and existing under and by virtue of the laws

of the State of New York alleges and respectfully shows to this Honorable Court:

The proceeding which this petition seeks to review is the determination of the Circuit Court of Appeals for the Second Circuit, which affirmed the Judgment at law rendered by the District Court of the United States for the Southern District of New York, dismissing the complaint after a trial to the Court upon written stipulation waiving a jury, and upon facts stipulated by the parties. The District Court specially found the facts as stipulated and embodied its conclusions of law in a decision.

The petitioner was the plaintiff in the action and the appellant in the Circuit Court of Appeals, and will be hereinafter referred to as the plaintiff; and the respondent will be referred to as the defendant.

The action involves the interpretation to be given Sections 607 and 611 of the Revenue Act of 1928, and, if the interpretation of the defendant be accepted, the constitutionality of those sections under the Fifth Amendment of the Constitution of the United States.

The plaintiff filed its income and profits tax return for the year 1919 on March 11, 1920, and during the year paid the taxes due according to the report. In March, 1924, the Commissioner of Internal Revenue assessed a deficiency against the plaintiff, and on April 5, 1924 the Collector of Internal Revenue made a demand for the amount of this deficiency. The plaintiff filed a claim for the abatement of the tax on April 16, 1924. On September 28, 1925, the Commissioner of Internal Revenue rejected the claim for abatement. On November 14, 1925 (more than five years after the

filing of the return), the plaintiff paid the amount of the deficiency with interest under threat of distraint and in fear of such threat and of the penalties prescribed by the Statute.

Thereafter, the plaintiff filed a claim for refund on the ground that the collection from the plaintiff of the amount of this deficiency was an illegal exaction by the Collector inasmuch as the period of limitations for the collection had expired. This claim for refund was rejected, and the action was seasonably brought in 1927 against the Collector for the recovery of the amount so exacted.

The Revenue Act of 1918 under which the tax was levied provided in part as follows:

> "SEC. 250. * * * (*d*) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due." 40 Stat. 1083.

Under the decision of this Court, in *Bowers v. N. Y. & Albany Lighterage Co.*, 273 U. S. 346, and, indeed, under the decision of the Circuit Court of Appeals for

the Second Circuit, in *Ellay Co. v. Bowers,* 25 Fed. (2) 637, the collection was illegal and the plaintiff, when the action was brought, had a good and sufficient cause of action for its recovery, and the District Court so found.

After the commencement of this action, and no doubt, to meet some of the results of the decision of this Court in the N. Y. & Albany Lighterage Co. case, the Congress incorporated into the Revenue Act of 1928, Section 612 which repealed Section 1106*a* of the Revenue Act of 1926, and Sections 607 and 611, which provided as follows:

> "SEC. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." 45 Stat. 874, 26 U. S. C., Sec. 2607 (26 U. S. C. A., Sec. 2607).
>
> "SEC. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the

period of limitation on assessment and collection." 45 Stat. 875, 26 U. S. C. 2611 (26 U. S. C. A., Sec. 2611).

The Court below found that the Sections of 1928 Revenue Act above quoted should be so construed as to deprive a taxpayer, situated as is the plaintiff here, of the right to recover the amount thus illegally collected. The Court also found that given such interpretation, the statute none the less did not deprive the plaintiff of its property without due process of law in contravention of the Fifth Amendment of the Constitution of the United States.

The questions which your petitioner therefore desires this Court to settle are:

> Do sections 607 and 611 of the Revenue Act of 1928 constitute a mere limitation upon the right of the Commissioner of Internal Revenue, to make refund or give credit in respect of collections made after the expiration of the statutory period, or do they as well bar a recovery in a proper Court of Law by a taxpayer against a Collector who had exacted collection of the tax after the expiration of the statutory period.

and

> If a statute enacted by the Congress imposing a tax contains a provision to the effect that the tax shall not be collected after the expiration of a stated period and the collection is exacted after the statutory period has expired, may the Congress without violation of the Fifth Amendment of the Constitution of the United States enact a statute depriving the taxpayer of the right to recover the amount so collected.

These questions are of extreme importance to the public interest from many aspects. From the fiscal standpoint the Government has always argued that hundreds of millions of dollars which have been collected from taxpayers under similar circumstances, are to be retained by the Government or repaid to the taxpayers according to the decision which is finally reached in such cases as these. From the commercial standpoint, this case would decide whether a business man may consider an outlawed tax as a liability which has been definitely eliminated and may make his commitments accordingly, or whether he must set up a perpetual reserve against the possibility that Congress might in the future validate an enforced collection.

Of even greater importance, however, is the constitutional principle involved. The doctrine apparently announced by the Circuit Court of Appeals seems to be that a citizen may be deprived of a cause of action by legislative fiat without violation of his constitutional rights, provided only that the deprivation seems to the Court fair and just in its results; and that the deprivation is fair and just in its results if the cause of action was based upon the expiration of a statutory period of limitations.

The United States Courts of inferior jurisdiction which have had these questions presented to them, have reached conflicting results. In commenting upon this conflict Judge Learned Hand, who wrote for the Circuit Court of Appeals in the case at bar, said:

> "In spite of the extraordinary differences in judicial opinion which the situation has evoked—differences which only the Supreme Court can

> eventually settle—the underlying facts are not complicated."

and again:

> "We have quite deliberately avoided the citation of those decisions which hitherto dealt with these questions. Those in the district court are so many and so conflicting that it would serve no purpose merely to enumerate them. In the Circuit Courts of Appeal at present the plaintiff would win in the Fifth (U. S. *v.* Burden, Smith & Co., 33 Fed. (2) 229, and lose in the Ninth (Huntley *v.* Gile & Jenks, 32 Fed. (2) 857; Goodcell *v.* Graham & Foster, 35 Fed. (2) 586). Apparently, he would also lose in the Court of Claims, though we have not been favored with the citation in an available form (Gotham Can Co. *v.* U. S.)."

Your petitioner urges that the two sections of the Revenue Act of 1928 above quoted, merely precluded the Commissioner of Internal Revenue from allowing a credit or making a refund of the amounts collected under the circumstances present in this case, but did not deprive a taxpayer of his common law right to sue the Collector for moneys illegally exacted; that if these sections do deprive the taxpayer of his common law right to such recovery then they are violative of the Fifth Amendment. The statute involved is not a mere statute of repose. The time limitation was incorporated in the same statute which created the statutory liability for the tax, and under principles long established by the decisions of this Court such statutory limitations are themselves conditions imposed

upon the statutory liability and the liability itself ceases with the expiration of the period. To fortify this position the accompanying brief is respectfully submitted herewith.

The Court has granted a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in the case of *Graham and Foster, copartners, against Goodcell,* former Collector (281 U. S. 708) (reported below, 35 Fed. (2d) 586). In the Graham and Foster case the interpretation of Sections 607 and 611 is also involved. From a reading of the report of the case in the Circuit Court of Appeals it is not certain, however, that all of the questions above outlined can be raised in this Court. Moreover, it does not seem likely that the Graham and Foster case would be held to involve the entire scope of Section 611 and Section 607. The opinion of the Circuit Court of Appeals in the Graham and Foster case concerns itself almost exclusively with the meaning of the word "stay" as used in Section 611, and the questions of interpretation and of constitutionality upon which the Court below in this action based its entire decision were not even discussed. More important, however, is the circumstance that in the Graham and Foster case the claim in abatement was rejected on December 27, 1922, which was within the five year period after the filing of the return. It would seem, therefore, that the Collector had an opportunity after the claim in abatement was rejected to make collection within the five year period. Such is not the situation in the case at bar, and it would seem to follow that even were the Graham and Foster case decided in favor of the taxpayer, it might not neces-

sarily govern the case at bar, and a great body of the cases to which Section 607 and Section 611 would apply.

It is, therefore, the desire of the petitioners that this case be brought before this Honorable Court by certiorari in the hope that it may be advanced so that it may be heard with the Graham and Foster case and the entire scope and validity of Section 607 and Section 611 passed upon.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in the said Circuit Court of Appeals in this case, and which was entitled in that Court DANIEL REEVES, INC., Plaintiff-Appellant, against CHARLES W. ANDERSON, individually and as Collector of Internal Revenue for the Third District of New York, Defendant-Appellee, to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief and remedy in the premises as to the Court may seem just, and that said judgment of the Circuit Court of Appeals may be modified by this Honorable Court.

DANIEL REEVES, INC.,
Petitioner,

By ELKAN TURK,
HERMAN GOLDMAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 463

DANIEL REEVES, INC. (PLAINTIFF-APPELLANT BELOW), PETITIONER,

against

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK (DEFENDANT-APPELLEE BELOW), RESPONDENT.

BRIEF IN SUPPORT OF PETITION OF DANIEL REEVES, INC., FOR WRIT OF CERTIORARI.

Statement.

The opinion of the Circuit Court of Appeals embodying the determination of which review is here sought, was announced on July 21st, 1930, and has not yet been published in the official reports. It appears, however, at page 8914 of the 1930 Federal Courts Volume of the Commerce Clearing House.

In the District Court the case was decided by the Judge on stipulated facts, and the decision of the Judge incorporated the opinion written by him when this action and other actions of a similar nature were before him on motions for judgment on the pleadings, and this opinion appears under the title of *Regla Coal Company v. Bowers,* 37 Fed. (2d) 273.

The petitioner respectfully requests the Court to take jurisdiction by certiorari pursuant to Section 240 (*a*) of the Judicial Code (28 U. S. C. A. 347*a*) for the reason that important questions of Federal statutory interpretation and of constitutionality are involved which affect the national revenues and which have been variously decided in the several Circuits and which only the decision of this Court can finally adjudicate.

Statement of the Case.

The facts were stipulated by the parties below. For the purpose of this statement the petitoner will be referred to as the plaintiff, and the respondent as the defendant.

On March 11th, 1920, the plaintiff filed with the Collector of Internal Revenue its income and profits tax report for the year ended December 31st, 1919 (R. 12), and between March 15th, 1920, and December 15th, 1920, the plaintiff paid to the Collector the entire amount shown due by its report, and the plaintiff believed in good faith that it was paying the amount of its entire tax liability (R. 12-13).

On April 5th, 1924, the plaintiff received notice that an additional assessment of $1,886.79 had been made

against it for the year 1919 (R. 13). On April 16th, 1924, the plaintiff filed a claim in abatement with respect to this additional assessment (R. 14). On September 28th, 1925, the Commissioner of Internal Revenue rejected the claim in abatement (R. 14).

On November 14th, 1925 (and more than five years after the filing of plaintiff's return) the defendant as Collector of Internal Revenue collected from the plaintiff the sum of $2,061.31, claimed to be the defendant's additional income and profits tax for the year 1919 (R. 13). This amount the plaintiff paid under duress (R. 13). After the filing of the claim in abatement and until the time of collection, neither the defendant or any other officer of the Government had taken any proceedings for the collection of this additional assessment (R. 14).

The defendant on April 27th, 1927, filed the statutory application for refund with the Commissioner of Internal Revenue, and this application for refund was denied on November 5th, 1927 (R. 13-14). This action was commenced seasonably thereafter for the recovery of the amount so collected upon the ground that it constituted illegal exaction.

The defendant relied upon the defense that by reason of the filing of the claim in abatement and the delay in the collection by the Commissioner, Sections 607 and 611 of the Revenue Act of 1928 deprived the defendant of the right to recover (R. 5 and 6).

The District Court in its decision specifically found that on November 14th, 1925, when the additional assessment was collected from the plaintiff, the defendant was prohibited by statute from collecting it, the

collection was illegal and the plaintiff had a good and sufficient cause of action for its recovery (R. 16), and further found that Sections 607 and 611 bar this recovery and thus operating as a bar are nonetheless constitutional (R. 16 and 17).

Specification of Errors.

The petitioner contends that the Court erred (*a*) in holding that the effect of Sections 607 and 611 is to bar actions at law for the recovery of taxes illegally collected as were those in the case at bar, and (*b*) in holding that those sections are constitutional if they have that effect.

Summary of Argument.

The petitioner contends that the plain language of these statutes does not affect actions at law against a Collector of Internal Revenue, but merely direct the Commissioner of Internal Revenue when he may and when he may not make refunds and give credits for amounts collected after the statutory period has expired. The policy of distinguishing between actions against the Collector and refunds and credits by the Commissioner, is carried forward from Sections 1106(*a*) of the Revenue Act of 1926, and this distinction was recognized by the Circuit Court of Appeals of the Second Circuit as applying to the 1926 Act. The distinction is one based upon practical considerations.

If the statutes, however, are intended to bar recovery on such cases as this, then they are unconstitutional. The limitation period is included in the

statute under which the tax is levied. Under the decisions of this Court where a statute creates a liability and at the same time imposes a limit of time for its enforcement, the limit of time is a condition of the liability, and upon the expiration of the time the liability is extinguished. The re-creation of a liability once extinct amounts to taking of property without due process of law.

The Statutes Involved.

In the foregoing petition we have quoted Section 250(*d*) of the Revenue Act of 1918 and Sections 607 and 611 of the Revenue Act of 1928. We do not believe that it will aid the Court to repeat the quotation here.

The remaining statute which is of leading importance is Section 1106(*a*) of the Revenue Act of 1926, which provided:

> "SEC. 1106(*a*). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Point I.

Sections 607 and 611 of the Revenue Act of 1928 do not constitute a bar to actions at law against the Collector.

It is to be noted that Section 1106(*a*) of the Revenue Act of 1926 (which was repealed by Section 612 of the Revenue Act of 1928) provided in substance that no refund or credit should be allowed on account of taxes paid after the statutory period had expired, unless they constitute overpayments. Nonetheless, the Circuit Court of Appeals for the Second Circuit held in the case of *Ellay Company v. Bowers*, 25 Fed. (2d) 637 (certiorari denied, 48 S. C. T. 601), that this prohibition against credit and refund applied to the Commissioner of Internal Revenue only and did not constitute a bar to actions against the Collector. In that case the Circuit Court of Appeals to which the certiorari is now requested held that the collection by the Collector after the statutory period had expired constituted an illegal collection, and that a common law action for recovery would lie. Judge Manton, speaking for the Court, said:

> "A collection, after the statute of limitations against the collection has run, constitutes an illegal payment within the purview of Section 3226 of the Revised Statutes (26 U. S. C. A. Section 156; Comp. St. Section 5949), and a taxpayer may recover upon the ground that the tax was barred by the statute. *Seaman v. Bowers, etc.*, 297 Fed. 371."

A like interpretation of Section 1106(*a*) was supported in

Thornhill Wagon Co. v. Noel, 17 Fed. (2d) 407;
Gove v. Nichols, 23 Fed. (2) 856.

The similarity in the language employed by the Congress in Section 1106(*a*) of the 1926 Act and Sections 607 and 611 of the 1928 Act, should be sufficient to argue for a similarity of interpretation. The Court below went so far as to state that this argument is plausible; that it seemed to find difficulty now in justifying an interpretation which would permit a recovery at law while denying a refund by the Commissioner.

We respectfully submit that there is no such difficulty; but that, on the other hand, cogent reasons existed for insisting upon a Court adjudication in these cases rather than a summary determination by the Commissioner.

Section 250(*d*) of the Revenue Act of 1918 which is the limitation statute here directly involved, provided for different rules where the return was filed in good faith from those where fraud is involved. The several statutes relating to taxation have made numerous provisions relative to waivers and extensions of periods of limitation. Many questions of fact and of law would thus be involved in every claim for refund. To determine whether such claim should be allowed, it would be necessary to decide whether or not there has been fraud and whether or not any waivers or extensions have been executed, and if so whether they are valid, and what their legal effect and interpretation may be. All of these are questions which the

Congress might with good reason have committed to the Courts of the United States rather than to such administrative officer as the Commissioner of Internal Revenue, in view of the vast sums which are stated to be involved in such cases. Thus the logic of the situation supports the plain language of the statutes themselves in calling for an interpretation such as petitioner contended for below.

Point II.

If the statutes constitute a bar to the plaintiff's recovery, then they are violative of the Fifth Amendment.

At the outset, we should state that we are not unmindful of such decisions as those of this Court in *Campbell v. Holt*, 115 U. S. 620, in which it has been held that no constitutional rights are violated by a statute which extends the statutory period of limitations against a common law liability, such as for money had and received or assumpsit. Such cases, we believe, go upon the proposition that such common law liability exists indefinitely and the statute of limitations merely affords an unconscionable defense.

Quite different, however, is the case where the liability is not common law in its origin, but rather is a creature of a statute, and the same statute prescribes the period within which the liability shall be enforced.

Purely statutory nature of the tax liability was thus stated by Mr. Justice Waite in *Merriweather v. Garrett*, 102 U. S. 472, 501:

> "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."

It would seem to need no argument that but for the Revenue Act of 1918 the plaintiff here would have been under no liability for the tax here in question. The Revenue Act of 1918 was specific in its prohibition against collection beyond the period of five years after the filing of the return. Under such circumstances, the liability itself was extinguished with the expiration of the five-year period.

As Mr. Justice Holmes stated in *Davis v. Mills*, 194 U. S. 451,

> "The common case is where the statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or in the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability, so specifically as to warrant saying that it qualified the right."

We also refer the Court to

The Harrisburg, 119, U. S. 199;

Phillips Co. v. Grand Trunk Western Railway, 236 U. S. 662;

Finn v. U. S., 123 U. S. 227;
Morgans, etc., v. Cocke, 273 U. S. 656;
Danzer v. Gulf Railway Co., 268 U. S. 633;
Atlantic Coast Line R. R. v. Burnette, 239 U. S. 199.

This Court has held that to revive a statutory liability after the lapse of the period limited in the statute itself is to take property without due process of law. Thus in the case of *Danzer v. Gulf Railway Co.*, 268 U. S. 633, this Court had before it the provisions of the legislation relating to Government operation of the railroads during the War, and particularly the provisions which sought to re-create and extend the limitation periods under the various transportation acts which had already expired. The following is the language of this Court:

> "We need not reexamine the doctrine of *Campbell v. Holt*, 115 U. S. 620, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained and that such repeal did not deprive the debtor of his property without due process of law in violation of the Fourteenth Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time and that the statute of limitations related to the remedy only and that the removal of the bar was not unconstitutional.

> The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action, are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (numerous cases cited). This case belongs to the latter class. Section 206 (F) will not be construed retroactively to create liability. *To give it that effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment* (numerous cases cited)." (Italics ours.)

The position of the petitioner is that that rule in the Danzer case has full application to the limitations contained in the Revenue Act of 1918.

If such were not the effect of the several limitation statutes, then by operation of Section 1106(*a*) of the Revenue Act of 1926, certainly the liability had been extinguished, and under the reasoning in the Danzer case it was not competent for the Congress merely by repealing the section two years after its enactment, to re-create the liability.

The argument above presented in its barest outline was disapproved by the Court below upon the ground that it presupposed that the inhibitions of the Fifth Amendment constituted a "remorseless pattern which

all legislation must fit". The Court below proceeded in disposing of this argument to say:

> "But constitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction. They are not the rules of a game; their meaning is lost when they are treated as though they were. It is quite true that the section took away a defense from the plaintiff; he is right to complain unless we can question the kind of defense it was. The moment we do, it must appear to any fair person that he ought to have it."

We submit that the view thus expressed with regard to the effect of constitutional limitations goes far beyond any view which has received the approval of this Court. We are not unmindful that with respect to the Fourteenth Amendment this Court has recognized that changing conditions require a more or less elastic view of the extent of the police powers reserved to the several states in the Constitution, and that due process of law under the Fourteenth Amendment must have a correlative elasticity. This view is set forth in *Euclid v. Ambler Realty Company*, 272 U. S. 365. Of course, similar reason does not exist with respect to the Fifth Amendment. But even the due process clause of the Fourteenth Amendment has never, so far as we can learn, been previously treated by any court as one which has or has not application to a particular statute according as the taking of property by the statute

may be judicially determined to be reasonable and fair or unreasonable and unfair.

Merely to indicate the conflict in judicial opinion upon this subject, we refer to the decision of the United States District Court, Western District of Arkansas, El Dorado Division, rendered on May 6th, 1930, in *Southern Lumber Company vs. United States of America,* which has not yet been officially reported, but which appears on page 8962 of the Federal Courts Volume of the Commerce Clearing House for 1930. Judge Miller, writing for the Court, said:

> "Not only had the remedial statute of limitations expired, but the very essence of the obligation was destroyed. The attempt of Section 612 of the Revenue Act of 1928 to revive claims already barred and extinguished would unconstitutionally deprive the taxpayer of property without due process of law. Congress has no power to re-create a liability once extinguished."

Nor can these statutes be sustained on the theory that they are mere ratifications of collections made in the name of the Government. This Court in *United States v. Heinszen,* 206 U. S. 370, and *Rafferty v. Smith, Bell & Company,* 257 U. S. 226, definitely settled the rule that in order to operate as a ratification, a statute must specifically express the intent to ratify and moreover that the legislature at the time of passing the ratifying act must have had the power to grant original authority to do the act. Here, no word even suggesting ratification appears in the statutes and by force of arguments above set forth, the Congress would have

been without authority after the expiration of the five year period, to authorize the collection at the time when the legislation was adopted.

Conclusion.

THE PETITIONER THEREFORE SUBMITS THAT THIS IS A PROPER CASE FOR THE ISSUE OF A WRIT OF CERTIORARI.

Respectfully submitted,

ELKAN TURK,
HERMAN GOLDMAN,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM—1930.

No. 463.

DANIEL REEVES, INC.,

Petitioner,

—against—

CHARLES W. ANDERSON, individually and as a Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITIONER'S BRIEF

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Supreme Court of the United States.

OCTOBER TERM—1930.

No. 463.

DANIEL REEVES, INC.,

Petitioner,

—against—

CHARLES W. ANDERSON, individually and as a Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITIONER'S BRIEF.

Statement.

This petition brings for review the determination of the Circuit Court of Appeals for the Second Circuit in an action at law in which the petitioner was the plaintiff in error and the respondent was the defendant in error. The opinion of the Circuit Court of Appeals has not yet been reported. The determination in the Circuit Court of Appeals affirmed a judgment dismissing the complaint rendered by the District Court of the United States for the Southern District of New York in the action in which the petitioner was the plaintiff and the respondent was the defendant. The judgment was rendered after a trial to the Court without a jury, upon a written stipulation waiving a jury trial (R. 11-12) and upon a written stipulation of facts (R. 12-15). The Court made special findings of fact embodying the facts as stipulated (R. 16) and made a decision including special conclusions of

law (R. 16-18). The decision incorporated the opinion which had been rendered by the District Court upon a motion theretofore made by the plaintiff for judgment on the pleadings in this action as well as in a number of similar actions (R. 16). The opinion thus incorporated is reported under the title *"Regla Coal Company v. Bowers"*, 37 Fed. (2nd) 373.

Ground Upon Which Jurisdiction Is Invoked.

This Court has brought this proceeding before it by a writ of certiorari pursuant to a petition filed under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347a). The judgment of the District Court was entered on March 6, 1930 (R. 11). The order for mandate of the Circuit Court of Appeals was filed July 28, 1930 (R. 40).

Statement of the Case.

The facts as stipulated by the parties (R. 12-15) were incorporated as a whole as special findings of fact in the decision (R. 16). These facts, so far as pertinent, are chronologically as follows:

On **March 11, 1920,** the plaintiff filed its income and profits tax return for the year ended December 31, 1919, and duly paid to the Collector an aggregate of $80,479.75, as shown by the return, which plaintiff believed in good faith to be the entire amount due from it (R. 12).

In **March, 1924,** the Commissioner made an additional assessment in the sum of $1,886.79 against the plaintiff (R. 14).

On **April 5, 1924,** the Collector of Internal Revenue made demand on the plaintiff for this additional assessment (R. 13).

On **April 16, 1924,** the plaintiff filed a claim for the abatement of the additional assessment (R. 14).

On **September 28, 1925,** the claim in abatement was rejected (R. 14).

On **November 14, 1925,** the defendant, as Collector of Internal Revenue, collected from the plaintiff the sum of $2,061.31, and the plaintiff paid this sum involuntarily, under duress and under protest (R. 13).

No proceedings of any kind for the collection of this amount were had or taken between March 11, 1920, when the original return was filed, and November 14, 1925, when the collection was made, a period of over five years. No bond was filed by the plaintiff in connection with the claim in abatement (R. 14); nor was any agreement entered into pursuant to which the collection was delayed (R. 14); nor was any writing of any kind entered into, pursuant to which the period of limitations applicable to the tax was extended (R. 15).

On **April 27, 1927,** plaintiff filed a claim for refund of the amount collected from it, and otherwise complied with the conditions precedent to the commencement of this action (R. 13).

Specification of Errors.

The petitioner contends that the Court below erred

(a) in holding that the effect of Sections 607 and 611 of the Revenue Act of 1928, is to bar actions at law for the recovery of taxes illegally collected, as were those in the case at bar; and

(b) in holding that those sections are constitutional if they have that effect.

Summary of Argument.

(a) The taxes in question were levied under the Revenue Act of 1918, which prescribed a five-year limitation upon collection. The effect of Sections 607 and 611 of the Revenue Act of 1928, was to permit the *Commissioner of Internal Revenue* to make voluntary refunds of all taxes collected after the expiration of the statutory period, in accordance with the decision of this Court in the *Albany Lighterage* case, 273 U. S. 346, except in cases where a claim in abatement had been filed by the taxpayer and collection was stayed; but that in cases where such claim was filed and such stay was secured, the *Commissioner* was prohibited from making voluntary refund or credit, *and the taxpayer was relegated to his action at law against the Collector; but that such action at law was in no wise interfered with.*

(b) Section 611 of the Revenue Act of 1928, has no application in any case, unless there was an actual stay of collection pending the determination of the claim in abatement.

(c) If Section 611 of the Revenue Act of 1928, is to be interpreted as defeating a common law action against the Collector for the recovery of a tax illegally collected after the expiration of the statutory period, then it is unconstitutional as depriving the taxpayer of his property without due process of law.

(d) Such unconstitutional effect may be obviated by applying Sections 607 and 611 of the Revenue Act of 1928, only to cases where the claim for refund was made after the adoption of the Act, and where, therefore, the taxpayer had not complied with all conditions precedent to the commencement of the action before the legislation was adopted.

The Statutes Involved.

Section 250 (d) of the Revenue Act of 1918:

> "Sec. 250. * * * (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due." 40 Stat. 1083.

Section 277 (a) (2) of the Revenue Act of 1924:

> "Sec. 277 (a) (2). The amount of income, excess profits and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, *the Revenue Act of 1917, the Revenue Act of 1918*, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be taken after the expiration of such period." (43 Stat. 253, 299.)

Section 1106 (a) of the Revenue Act of 1926:

> "Sec. 1106 (a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate

to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax." 44 Stat. 113, 26 U. S. C., §1249 note (26 U. S. C. A., §1249 note.)

Revenue Act of 1928, Sections 607, 611 and 612:

"Sec. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." 45 Stat. 874, 26 U. S. C., §2607 (26 U. S. C. A., §2607).

"Sec. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." 45 Stat. 875, 26 U. S. C. 2611 (26 U. S. C. A., §2611).

"Sec. 612. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926." 45 Stat. 875.

Argument.

POINT I.

The provisions of Section 611 of the Revenue Act of 1928 do not bar an action at law against the collector.

If the Congress, in adopting Sections 607 and 611 of the Revenue Act of 1928 had intended so drastic a measure as to take from taxpayers rights of action which they then had for the recovery of amounts illegally collected from them, more inappropriate language to accomplish such result could hardly have been chosen. No word appears expressly validating such collection. No language appears precluding the appropriate Court from granting judgment in favor of the aggrieved taxpayer. Section 607 merely authorizes *a refund* or *a credit* of such collections in general, and Section 611 merely excepts from the operations of Section 607 the cases where assessments were made prior to June 2, 1924, claims in abatement were filed and collections stayed.

To *credit* or to *refund* is characteristically the function of the Commissioner of Internal Revenue and not of the Courts of the United States (R. S., §3228; 26 U. S. C. A., §157). The claim for refund is "presented to the Commissioner" (R. S., §3228; 26 U. S. C. A., §157). Indeed, the Court has not the machinery by which a credit could be effected, even should it so desire. Our point therefore is that Section 607 merely conferred upon the *Commissioner of Internal Revenue* the power denied him under Section 1106 (a) of the 1926 act to make refund or credit in a normal case of collection after the statutory period, in full obedience to the determination of this Court in the *Albany Lighterage* case (273 U. S. 346), and

that Section 611 withheld such authority in a case where the abatement claim was filed and collection stayed, relegating in such case the taxpayer to his action at law.

Such is the apparent requirement of the plain language of the statute. Such requirement is fortified by the history of these sections.

The Revenue Act of 1918 under which the taxes in this case were levied as well as the subsequent acts contained provisions prescribing the period during which taxes levied thereunder could be collected.

The Revenue Act of 1924 which was enacted on June 2, 1924, provided that in cases where the assessments had been made within the period permitted for assessments under the earlier acts, collections might be made within six years after the date of the assessments.

The Internal Revenue authorities apparently proceeded upon two suppositions. In the first place they supposed that the limitations upon collections prescribed in all of the Revenue Acts were mere limitations upon *actions* for collections, but not upon distraints. The second supposition apparently was that under the 1924 act, assessments made under the earlier acts, both before and after June 2, 1924, were brought within the provision permitting collection within six years after the assessment.

On December 7, 1925, the Court of Claims decided the case of *Toxaway Mills* v. *U. S.* (61 Ct. Cls. 363). That case held that where collections were made after the statutory period had run, the taxpayer could none the less recover only the amount by which the collection made exceeded the taxpayer's true liability. The holding proceeded upon the theory that the expiration of the period under the earlier acts only barred the remedy *but did not extinguish the taxpayer's liability.*

When Congress had before it for consideration the Revenue Act of 1926, this Court had already decided the case of *Graham* v. *Dupont* (262 U. S. 234), which had foreshadowed the ultimate decision made in the *Albany Lighterage* case, and Section 1106 (a) was proposed to be included in the Revenue Act of 1926. This section was reported to the Congress by a Conference Committee (House Report 356, p. 55, 69th Congress, First Session) as follows:

> "Amendment No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *U. S.*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft, *C. J.*, in *Graham* v. *DuPont* (262 U. S. 234, 256, 258.)."

From this report it is evident that the Congress intended to legislate away the effects of the *Toxaway Mills* case and to provide that upon the expiring of the limitation periods in the preceding acts not alone *was the remedy for collections barred, but the taxpayer's liability itself was extinguished.*

Section 1106 (a) of the Revenue Act of 1926 (quoted above, pp. 5, 6), however, provided that although the liability of the tax payer had been *extinguished* by the limitation, no *refund* or *credit* could be made except to the extent that the collection exceeded the taxpayer's true liability. It is notable that the Circuit Court of Appeals for the Second Circuit decided in *Ellay Co.* v.

Bowers (25 Fed. (2nd) 637) that the effect of Section 1106 (a) was to permit the taxpayer to recover by action against the collector the entire amount of a collection exacted after the running of the limitation period, but that a voluntary *refund* or *credit* could be made only to the extent that the collection constituted overpayment.

Then came the decision of this Court in the *Albany Lighterage* case which held that the expiry of the limitation periods affected collections by distraint as well as collections by suit, and that taxpayers might recover the entire amount collected from them by distraint.

When the Congress met for the Session of 1928, also, there were pending in the Courts cases in which the taxpayers claimed that the 1924 act properly applied the six-year extension for collection only to assessments made under the earlier acts where such assessments were made after June 2, 1924, the date when the 1924 act went into effect, and indeed, on January 2, 1929, this Court decided in *Russell* v. *U. S.* (278 U. S. 181) that only the assessments made after June 2, 1924, were subject to such lengthened period for collection.

Under these circumstances the Revenue Act of 1928 was adopted. Section 612 of the 1928 act (quoted above at p. 6) repealed 1106 (a) as of its enactment date. In place thereof Section 607 was enacted. Section 607 gave the Commissioner the authority to make refund or credit of the entire amount which had been illegally exacted from the taxpayer after the expiry of the limitation period, but in doing so, the Congress apparently felt it necessary to enact a legal fiction, *i. e.*, that the entire amounts so collected "shall be considered an overpayment". Section 611 of the Revenue Act of 1928 excepted from the operation of Section 607 assessments made prior

to June 2, 1924, *i. e.*, assessments which were thought to be, and which by the *Russell* case this Court afterwards held, exempt from the extended period for the collection as provided for in the 1924 act; so that where assessments were made too early to enable the collector to have an additional six years for collection, the Commissioner was not authorized to make voluntary credit or refund under the provisions of Section 607.

The history of this legislation thus considered seems conclusive upon the proposition that the Congress intended that the effect of the limitation period was to extinguish the taxpayer's liability and to render mandatory recovery at law for the full amount collected after the statutory period.

So far, however, as concerned assessments which were not affected by the 1924 act, the Congress was not content to have refund made by purely administrative action, but desired rather that all issues of fact involved in a procedure for recovery be determined by the Court and jury in an action at law.

The Court below, in commenting upon this phase of the controversy, acknowledged that the argument was plausible (R. 37) but refused to adopt the point of view here contended for, for two reasons: In the first place, the Court stated that it could not be that the Congress would permit the cause of action against the Collector to survive the enactment, and still require the filing of a claim for refund as a condition precedent (Section 3226 R. S.) where by hypothesis the claim for refund would necessarily have to be abortive. In the second place, the Court could see no logic in precluding the Commissioner of Internal Revenue from making credit or refund, a convenient and speedy administrative func-

tion, while at the same time permitting the Courts to grant a recovery.

We respectfully submit that the two objections made by the Court below do not answer the argument.

On the first point, as above noted, the same Court found no inconsistency in the *Ellay* case (*supra*), in holding that the taxpayer could recover the illegal payment under Section 1106 (a) of the Revenue Act of 1926, although that very section precluded a *refund* or *credit* of that amount by the Commissioner. Good reason might have determined the Congress in requiring at least six months' advance notice to the Internal Revenue Department before an action could be started, so as to enable the Department to prepare its evidence against the time of trial, and possibly, also, to prepare its budget against the day when judgment might be rendered. The filing of the statutory claim for refund, before the commencement of the action, would have provided such notice.

Nor would it seem to answer our contention that the Congress could not have purposefully permitted the Courts to grant a recovery while denying the Commissioner the right to grant a refund or a credit. There would seem to have been reason enough for the Congress to confide in the Courts alone the task of determining the rights of the taxpayer to the recovery of the moneys involved in these cases where claims in abatement had been filed.

The Congress in the 1928 session was greatly concerned with the amounts of refunds which apparently would result from the determination of this Court in the *Albany Lighterage* case, and deemed it inadvisable to permit a mere administrative officer, such as the Com-

missioner of Internal Revenue, to deal with the entire matter. Thus, in Section 710 of the Revenue Act of 1928 (45 Stat. 882, 26 U. S. C. A., 2710) it was provided:

> "No refund or credit of any income, war profits, excess profits, estate or gift tax, in excess of $75,000 shall be made after the enactment of this Act, until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation * * *."

With the point of view toward administrative refunds thus made manifest, it is not surprising that the Congress should have attempted to safeguard in every way the repayment to taxpayers of amounts collected from them after the statutory period had elapsed, where the Commissioner, on claims for abatement, had passed his judgment upon the correctness of the tax liability as assessed. In every such case, there remained issues of fact to be disposed of favorably to the taxpayer before the taxpayer would have a right of recovery.

Section 250 (d) of the Revenue Act of 1918 (quoted p. 5) made the statutory period inapplicable "in case of false or fraudulent returns with intent to evade the tax." Thus, fraud or good faith an issue of fact would be created which the Congress might with much logic have preferred to entrust to a court and jury rather than to the Commissioner of Internal Revenue. In the instant case, be it noted, it was found that the plaintiff's return was filed in entire good faith (R. 13), and there was

no fraud or element of fraud in connection therewith (R. 14). Moreover, in many cases, the taxpayer signed papers purporting to be stipulations or other waivers of the statutory period. Questions of fact and of law might arise as to the authenticity, validity or effect of such waivers and stipulations. These questions likewise the Congress might well have desired to become the subject of judicial determination rather than of administrative decision.

We shall contend in another point that to give these sections the construction contended for by the Government, would be to render them unconstitutional. Under the construction for which we contend, the sections remain valid and enforcible enactments. As between such two constructions, that which is constitutional is always preferred.

As we shall also demonstrate in a later point, the cause of action for the recovery of a tax illegally collected, has its origin in the common law, and it is indeed an action for money had and received. The construction of these sections contended for by the Government would destroy this common law right. Statutes are not considered to be in derogation of the common law unless their language forcibly so requires. In the absence of specific reference in these sections to common law actions for recovery of illegal collections, no such construction as that for which the Government contends would seem to be justified.

Therefore, the language of these sections, their history, the legislative policy involved, and recognized canons of construction, all require the interpretation urged by petitioner.

POINT II.

Section 611 of the Revenue Act of 1928 has no application because the collection of the tax was not stayed pending the claim in abatement.

In view of the number of similar cases which are to be argued with the case at bar, upon which briefs will be filed, which fully cover the present point, we shall not present our views in detail. We content ourselves with merely presenting a point of view which seems to confound the contention of the Government under this head.

The cases in the lower Courts, which have upheld the Government's contention, have reached the conclusion that the mere administrative delay by the Collector, a mere withholding of action on his part pending the claim in abatement, was a sufficient stay under the provisions of Section 611. This amounts to a holding that a mere delay of collection, voluntary or involuntary, was sufficient. If this conclusion be correct, then all reference in Section 611 to a stay is pure surplusage; for it cannot be escaped that unless there were a delay, voluntary or involuntary, such case as this could never arise. If the Collector did not delay collection for some reason, then by hypothesis he proceeded promptly to collection, and the limitation period would not have expired prior to collection.

The Courts do not incline toward a construction of a statute which renders so large a portion of the statute unnecessary. The argument that provisions for a compulsory stay without a bond are difficult to find in the statutory law, is not conclusive. The general practice of obtaining stipulations from taxpayers, waiving the

Statute of Limitations, or extending the period of limitations, was quite prevalent. In cases where such stipulations were executed by the Commissioner, the hand of the Collector was stayed without the filing of a bond. Indeed, Section 205, subdivision B of Title 2 of the Revenue Act of October 3, 1917 (40 Stat. 305), did provide for a compulsory stay upon the filing of a claim in abatement, even in the absence of a bond, and of course the Government will concede that the sections providing for a compulsory stay with bond were numerous.

In common legal parlance, the word "stay" connotes a restraint, and is the very antithesis of voluntary inaction.

POINT III.

If Section 611 is construed as barring such actions as this, then it violates the Fifth Amendment of the Constitution.

To present in their true perspective the various branches of our argument under this point, it may be helpful to introduce the matter in outline form.

I. Result of the expiration of the period prescribed by Section 250 (d) of the Revenue Act of 1918 was to extinguish the liability of the taxpayer and not merely to bar a remedy,

(a) because it was a statutory limitation upon a statutory right (1) the tax liability being purely statutory in its origin, and

(b) because Congress intended that the limitation periods should extinguish the liability and not merely bar the right, and

(c) because the courts have recognized that the liability was extinguished in permitting the taxpayers to recover the amounts collected after the expiration of the statutory period.

II. The cause of action which the taxpayer has for the recovery of a tax illegally exacted from him, is one granted by the common law, and this right had fully matured prior to the enactment of the Revenue Act of 1928.

(a) Such cause of action is property which may not be taken without due process of law.

III. If Sections 607 and 611 are so construed as to deprive the plaintiff of its cause of action, then they are unconstitutional as taking the plaintiff's property without due process of law,

(a) the legislative re-creation of a liability after the expiration of a period of limitation upon the statutory right constituting a taking of property;

(b) the legislation not being a ratification of the earlier collection for the reason

(1) that the intention to ratify was not expressed, and

(2) Congress would have been incapable of ratifying the Act in 1928, and

(c) Congress having been incapable in 1928 of constitutionally imposing the 1920 tax anew.

IV. There is no power in the Congress to take property without due process of law even when such taking may seem fair to the Court.

I. *The result of the expiration of the period prescribed by Section 250 (d) of the Revenue Act of 1918 was to extinguish the plaintiff's liability and not merely to bar the remedy of the Collector.*

(a) *The limitation provided in that section was a statutory limitation upon a right of purely statutory origin.* The liability which the plaintiff owed to the government by way of taxes for the year 1919 was a liability of purely statutory origin. The Constitution, Article I, Section 8 confided the duty of laying taxes to the Congress:

> "The Congress shall have the power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States * * *."

This Court said in *Merriweather* v. *Garrett*, 102 U. S. 472, 501:

> "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."

The tax liability thus being a creature of statute is not a debt in any sense of the word. *Lane County* v. *Oregon*, 74 U. S. 71, 78, 80; *Bristol* v. *Washington*, 177 U. S. 133, 147, 148; *Moore* v. *Mitchell*, 30 Fed. (2d) 600, 602 (2d Circuit); *St. Joseph's Land Co.* v. *Mac Lean*, 37 Fed. (2d) 984, 987 (8th Circuit); *Liberty Mutual Insurance Co.* v. *Johnson*, 6 Fed. (2d) 752, 755 (Decree Affirmed in *Stripe* v. *U. S.*, 269 U. S. 503).

It is to be noted, therefore, that the tax liability of the plaintiff for the year 1920 had its origin in the Revenue Act of 1918. That very Act in Section 250, subdivision (d) prescribed the limitation, and in definite language negatively provided:

> "No suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made."

We then have here a case where there was a liability arising out of statute, and the same statute prescribed a limitation.

It has been the invariable holding of this Court that where a limitation is appended to a statutory liability, upon the expiration of the limitation period the liability itself is completely extinguished. It is not merely a case of a bar arising against remedies. This is true although the limitatiton may not be in the same statute which imposes the liability. It is universally recognized, however, that the strongest case for extinction of liability is made out where the same statute imposes the liability and fixes the limitation. The Courts of the several states recognize this rule.

Hester v. *City of Brockton*, 251 Mass. 41.

The rule was thus laid down by Mr. Justice Holmes in *Davis* v. *Mills*, 194 U. S. 451:

> "The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or

> in the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability, so specifically as to warrant saying that it qualified the rights."

This rule has been applied by this Court in a great variety of cases. Among those are cases of a statutory liability of corporate directors, *Davis* v. *Mills,* 194 U. S. 451; statutory liability for death by wrongful act, *The Harrisburg,* 119 U. S. 199; statutory rights of shippers to recover excess payments made to railroads, *A. J. Phillips* v. *Grand Trunk Western Railway,* 236 U. S. 662; *Danzer* v. *Gulf R. R. Co.,* 268 U. S. 633; *Atlantic Coastline R. R.* v. *Burnette,* 239 U. S. 199; statutes giving sub-contractors the right to sue in the name of the United States upon performance bonds given to United States by general contractors, *Texas Cement Co.* v. *McCord,* 233 U. S. 157, 162, *Title etc. Co.* v. *Harlan & Hollingsworth,* 228 U. S. 567, 571.

The lower Federal Courts have also recognized the rule in the following cases: Statutory limitation upon a statutory right to sue for conflagration caused by a railroad train, *Denver & R. G. R. Co.* v. *United States,* 241 Fed. 614; and it is to be noted that rule applies even as against the United States; statutes creating maritime liens, *The Edna,* 185 Fed. 206, 208.

This Court seems to have applied the same rule to a statutory tax liability arising under a state law, *Bristol*

v. *Washington County*, 177 U. S. 133, 148. The very point has been decided as applying to Federal tax liability in *Bashara* v. *Hopkins*, 290 Fed. 592 (Aff. 295 Fed. 319), where the following language was used:

> "Therefore it must follow, as a matter of course, that a collection of a tax made beyond the period allowed by law would be 'illegal', and such a collection would stand exactly upon the same basis as a collection made under an unconstitutional statute. * * * This recognition of the difference between a limitation in a special act and a general statute of limitations renders inapplicable such decisions and texts as paragraph 4, 17 Ruling Case Law, 66; *Hopkirk* v. *Bell*, 3 Cranch, 454, 2 L. Ed. 497; *Edwards* v. *Kearzey*, 96 U. S. 598, 24 L. Ed. 793; *Campbell* v. *Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483; *Campbell* v. *City of Haverhill*, 155 U. S. 612, 15 Sup. Ct. 217, 39 L. Ed. 280—which hold that the plea of limitation defeats the remedy only, the debt remaining."

(b) ***There is abundant evidence that in enacting the limitation sections in the successive Revenue Acts, the Congress intended to extinguish the taxpayers' liability.*** In the House of Representatives' Report No. 179, the following language was used with relation to the Revenue Act of 1924:

> "The purpose of a limitation upon assessment is to assure the taxpayer that after the period has run and no assessment has been made, no taxes may be collected from him."

Such assurance would be worse than illusory if the taxpayer, relying upon the limitation, made his business

commitments without regard to any possible tax liability, and found that a subsequent Congress experiencing a change of heart could reimpose the tax.

So, likewise, evidentiary of this interpretation is the adoption of Section 1106 (a) of the Revenue Act of 1926, which, by the history of the section above set forth, was intended to correct the misapprehension of Congressional purpose in the *Toxaway Mills* case. For in Section 1106 (a) the Congress, speaking generally of Internal Revenue Tax liabilities, said:

> "The bar of the statute of limitations against the United States in respect of *any* Internal Revenue Tax shall not only operate to bar the remedy but shall extinguish the liability * * *." (Italic ours.)

This Court in effect recognized such intent on the part of Congress in *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346. There the argument apparently was not made that the liability was extinguished, but this Court expressed the same thought in a different way, as follows:

> "The purpose of the enactment was to fix a time beyond which steps to enforce collection might not be initiated. The repose intended would not be attained if suits only were barred, leaving the Collector free at any time to proceed by distraint. In fact, distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit."

Obviously, the mischiefs referred to by this Court were the uncertainty as to the liability for taxes in respect of past years and the fears entertained by business men relative thereto which constituted a brake upon commercial and industrial progress.

(c) *The courts have recognized that the liability was extinguished by permitting taxpayers to recover amounts collected after the statutory period.* Both this Court and the lower Courts have recognized the right of a taxpayer to recover amounts collected from him after the expiration of the statutory period.

Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346;
Ellay Co. v. *Bowers*, 25 Fed. (2nd) 637.

This ruling establishes that the liability for the tax was extinct at the time of the collection. It is a well recognized principle that when a creditor collects under duress the amount of an ordinary debt which was barred by an ordinary statute of limitations, the debtor cannot recover.

Cunningham v. *Hussey*, 122 Maine 565;
Briggs v. *Withey*, 24 Mich. 136;
Baeth v. *Chapoton*, 115 Mich. 506;
Wilbur v. *Blanchard*, 22 Idaho 517.

The very holding of the *Albany Lighterage* case compels the conclusion that the effect of Section 250 (d) of the Revenue Act of 1918 was to extinguish the plaintiff's liability.

The District Court in disposing of our contention held that the rule laid down in *Campbell* v. *Holt*, 115 U.

S. 620, as applying in cases of ordinary statutes of limitation against debts, was controlling. All that we have said above, we believe, renders that position untenable. This Court recognized in *Campbell* v. *Holt*, that a common law liability for debt persists forever. But for a statute of limitations it could be collected forever. The limitation being in bar of the common law right, is held in such cases merely to go to the remedy and, therefore, when the statute is repealed after the period has expired, the common law right persists without defense. The principle cannot apply where the liability is the creature of statute and persists only so long as the statute gives it life. *Danzer* v. *Gulf, etc., Ry. Co.*, 268 U. S. 633.

II. *The plaintiff's cause of action for the recovery of a tax illegally exacted is one granted by the common law, and this right had fully matured prior to the enactment of the Revenue Act of 1928.*

The general proposition that the cause of action of a taxpayer situated as is the plaintiff here is a right granted by the common law was stated by Mr. Justice Holmes in *United States* v. *Emery et al.*, 237 U. S. 28, as follows:

> "The right to sue the Collector for an unjustified collection was given by the common law."

We also refer to *State Tonnage Tax Case*, 79 U. S. 204, 209, 221, 223.

The theory, of course, is that when statutory authority for the collection fails by reason of the unconstitutionality of the statute or its expiration, the collector no longer is the agent of the Government but proceeds as a private wrongdoer.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, page 282, this Court said:

> "The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another."

The Court is also referred to

> *Old Colony Trust Co.* v. *Seattle*, 271 U. S. 426;
> *Erskine* v. *Van Arsdale*, 15 Wallace 75.

This common law right of action against the defendant was vested in the plaintiff prior to the enactment of the 1928 Act.

The Court below in its decision (R. 16) held:

> "Second: The collection by the defendant of the sum of $2061.31 on November 14, 1925, constituted an illegal collection.
>
> Third: On November 14, 1925 and immediately thereafter the plaintiff had a good and substantial cause of action against the defendant for the recovery of the sum of $2061.31 with interest thereon from November 14, 1925."

A right of action is property which may not be taken without due process of law in contravention of the Fifth Amendment.

In *Pritchard* v. *Norton*, 106 U. S. 124, this Court held, at page 132:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."

We also refer the Court to *Auffm' Ordt* v. *Rasin*, 102 U. S. 620, 622; *U. S. F. & G.* v. *Struther*, 209 U. S. 306, 314; *Texas Cement* v. *McCord*, 233 U. S. 157, 162; *Angle* v. *Chicago etc. Ry. Co.*, 151 U. S. 1; *Forbes Pioneer Boatline* v. *Commissioners*, 258 U. S. 338.

From the standpoint of the matter now under consideration, however, we believe that the cases in the actions against the Collectors in the District Court stand upon even a firmer ground than actions against the United States in the Court of Claims and should be decided in favor of the taxpayer even though the actions which have been brought against the United States may be decided another way. It is recognized that a sovereign may grant to its citizens the right to sue or may withhold such right. The right once granted, does not, it would seem, stand upon the same firm and immutable basis as does the common law right which under this heading we have been discussing.

III. *If Section 611 is so construed as to deprive the plaintiff of its cause of action, or as recreating the extinct tax liability for the year 1920, then it is unconstitutional as taking the plaintiff's property without due process of law.*

The authorities last cited under the foregoing head are clearly to the effect that if Section 611 of the Revenue Act of 1928 takes away the cause of action which is vested in this plaintiff, it is taking the plaintiff's property without due process of law. No useful purpose, it seems, would be served by multiplying authorities upon that point. We, therefore, here consider the proposition from the standpoint of the re-creation of a liability which has already been extinguished.

(a) *The re-creation of liability amounts to the taking of property without due process of law.*

The outstanding case upon this point is *Danzer* v. *Gulf etc. R. R. Co.*, 268 U. S. 633. That case dealt with the limitation provisions included in the legislation providing for Government operation of railroads during the World War, and particularly with the provision which sought to re-create liabilities and extend a period of limitations already expired under the various transportation acts. This Court held in the first place that the case of *Campbell* v. *Holt* had no application to the case because the liability was statutory in its origin. Coming then to the provisions of Section 206 (f) of the Act which apparently was intended to re-create liability, this Court said:

> "Section 206 (f) will not be considered retroactively to create liability. To give it that effect would be to deprive the defendant of its property without due process of law in contravention of the Fifth Amendment."

A valuable discussion of this subject also is to be found in the opinion of Judge Sanborn in *Eberhart* v.

United States, 204 Fed. 884, 890, 891, 892, 893. Judge Sanborn said in part:

> "If the Act of 1911 has any effect, it has the effect to deprive these sureties, who are free from all liability to the bank, of $23,693.44, and to transfer that amount of their property to the bank. This was done, if it was done at all, not by any process of law, but by the arbitrary act of the legislative body, without notice, trial or hearing. An act of Congress which has such an effect not only violates the fifth amendment to the Constitution, but is beyond the powers of the legislative department of a republican government, and void."

The Court is also referred to *Levy* v. *Wardell,* 258 U. S. 542; *Forbes Boatline* v. *Commissioners,* 258 U. S. 338; *Union Pacific R. R.* v. *Laramie Stockyards,* 231 U. S. 190; *Winfree* v. *Northern Pacific Ry. Co.,* 227 U. S. 296; *Auffm' Ordt* v. *Rasin,* 102 U. S. 620, 622.

It is petitioner's view that Section 1106 (a) of the Revenue Act of 1926 merely stated the congressional interpretation of the limitation provisions of the preceding Revenue Acts and of the Revenue Act of 1926 when it stated that the effect of such limitations was to extinguish the liability. If, however, another view be taken, *i. e.,* that Section 1106 (a) of the 1926 Act stated a new principle of legislative policy and thereby extinguished the liabilities which had theretofore only been subject to defense, none the less, the plaintiff must here succeed, for it would not then have been competent for the Legislature in 1928 to repeal the enactment of 1926 and by such repeal to revive rights which had thereby been extinguished, or to extinguish causes of action which

had thereby been brought into existence. The repeal of the statute cannot be given such effect.

In *Ware* v. *Hylton*, 3 Dal. 199, at page 242, this Court said:

> "This stipulation could not intend only to repeal laws that created legal impediments to the recovery of the debt (without respect to the mode of payment) because the mere repeal of a law would not destroy acts done, and rights acquired under the law, during its existence, and before the repeal."

The Court is also referred to *Society for the Propagation of the Gospel* v. *New Haven*, 21 U. S. 464; *Amy* v. *The Supervisors*, 78 U. S. 136, 138; *Auffm' Ordt* v. *Rasin*, 102 U. S. 620, 622.

(b) *Sections 607 and 611 of the Revenue Act of 1928 cannot constitute a valid ratification of the acts of the Collector in making these illegal collections* because

(1) They do not express the intention to ratify, and because

(2) Congress could not November 14, 1925, the date of the collection, have authorized the collection in advance.

The District Court sought to sustain this legislation as constituting a ratification of the collection (R. 26, 27). Although the Circuit Court of Appeals apparently did not accept this interpretation, the point may arise and merits discussion. The leading cases in this Court lay down two propositions as prerequisite to a ratifying

statute, first, that the statute must be express and leave nothing to implication, second, that the Congress must have had the power at the time that the act was done, to grant authority to the agent sufficient to warrant the act. Upon both of these points these sections fail as ratifying legislation.

The matter can best be demonstrated by a consideration of the leading cases in this Court upon the subject of ratification:

> *Lincoln* v. *United States,* 197 U. S. 419, and *U. S.* v. *Heinszen & Co.,* 206 U. S. 370.

It appears that on July 12, 1898, President McKinley had issued an order to Revenue Collectors authorizing them during the continuance of the war to exact certain imposts in the Philippine Islands. After the conclusion of the peace, the Collectors continued to function, and taxpayers resisted collection upon the ground that their authority had expired. Thereupon, by Act of July 1, 1902 (c. 1369, Section 2, 32 Stat. 691, 692), the Congress adopted a law which was expressly in the nature of a ratification and confirmation, but went no further than to ratify and confirm President McKinley's order and all the acts which were done pursuant thereto. It did not expressly ratify the acts of the Collectors in affecting collections after the peace had been declared. Accordingly, in *Lincoln* v. *United States,* this Court held that the law did not ratify these collections. In his opinion in this case, Mr. Justice Holmes said:

> "Without considering how far the first part of the section extends, the approval of the action of the authorities is confined to those which were in accordance with the provision of the order, which, as we have already intimated, the collection of these duties was not."

The Court also pointed out that the alleged ratifying legislation was adopted while the controversy represented by litigation was in progress and that Congress would expressly have covered the acts involved in the controversy, had such been the intention. Certainly, congressional intent to ratify was much clearer in the *Lincoln* case than in the case at bar. Thus far it appears that the intention to ratify must not alone be express but entirely specific in its address to the acts to which the ratification is claimed to apply.

After the decision in the *Lincoln* case, the Congress adopted new legislation which did specifically ratify the act of the Collector in making his collections after the peace had come, and thereupon the *Heinszen* case arose. This Court thereupon affirmed the right of the Congress to ratify acts done merely without precedent authority by its agents and then used the following language:

> "This being done, it is said, reduces the case to the inquiry, Had Congress power, years after goods which were entitled to free entry had been brought into the Philippine Islands, to retroactively impose tariff duties upon the consummated act of bringing the goods into that country? But the proposition begs the question for decision, by shutting out from view the potential fact that when the goods were brought into the Philippine Islands there was a tariff in existence under which duties were exacted in the name of the United States. Indeed the contention goes further even than this, since it entirely disregards the important consideration that although the duties were illegally exacted the illegality was not the result of an inherent want of power in the United States to have authorized the imposi-

> tion of the duties, but simply arose from the failure to delegate to the official the authority essential to give immediate validity, to his conduct in enforcing the payment of the duties. And when these misconceptions are borne in mind it results that the unsoundness of the proposition relied upon is demonstrated by the application of the elementary principle of ratification to which we have previously referred."

and again:

> "But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States, Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify."

The decision of the Supreme Court in *Rafferty* v. *Smith etc. Company*, 257 U. S. 226, is of like import.

From a consideration of these cases two principles stand out prominently. ***The first is that the ratifying act must be clear and unambiguous in its intent to ratify. The second is that the Congress must have had the power to authorize, in the first instance, the act ratified at the time when it was done.*** Upon these two points the cases referring to ratification have no effect upon the present controversy.

As to express intention to ratify, we rest our case upon the plain language of Sections 607 and 611. The

Congress would not have had the power on November 14, 1925, to authorize the collection from the plaintiff, because the liability under the 1918 law had been extinguished and because the Congress could not have, on that date, imposed anew the tax for the year 1920 as shown under the next head. Suffice it here to say that this Court in the *Heinszen* case relied upon the mere want of authority on the Collector's part, and refused to be bound to a like position had the Collector's act been illegal at the time when it was done.

(c) *The Congress would have been without authority either in 1925 or in 1928 to impose a new tax liability upon the plaintiff for the year 1920.*

The Court below intimated (R. 38) that the Congress might have had the power in 1928 to impose upon the plaintiff a tax for the year 1920 based upon its 1919 income. We recognize that not all so-called retrospective taxation is unconstitutional. No case, however, has gone so far as to recognize the validity of a law which attempted to impose upon taxpayers liabilities for preceding years. We feel the best way to approach the subject is to consider the types of so-called retrospective legislation which have been held valid.

The first type of such legislation is that in which previously existing laws imposed the tax burden, but due to omissions or negligence or misunderstanding on the part of the assessing authorities, property was either omitted or under-assessed and the administrative machinery provided in the tax statute was inadequate to reach back after a certain period of time had elapsed. In such cases there were no limitations upon the tax liability. The taxing officers were merely given the au-

thority within certain months or periods within which to make their assessment. In these cases it has been held competent for the Legislature thereafter to authorize the assessment of the property at its true value under the pre-existing law. In these cases no new tax was imposed for the years that were past. The old tax burdens were only made subject to collection. Or, to adopt the language of this Court in *White* v. *United States,* 191 U. S. 545,

> "Retrospective laws which have been sustained in the courts have ordinarily had the effect to remedy irregularities in legal procedure, assessment of property for taxation, and the like."

In this class of so-called retrospective tax legislation fall the following authorities among others: *Florida Central Railway* v. *Reynolds,* 183 U. S. 471; *White River Co.* v. *Arkansas,* 279 U. S. 692; *Sturges* v. *Carter,* 114 U. S. 511; *Winona etc. Co.* v. *Minnesota,* 159 U. S. 526; *Weyerhauser* v. *Minnesota,* 176 U. S. 550; *Spencer* v. *Merchant,* 125 U. S. 345.

The second class of so-called retrospective taxation which has been approved by this Court is that where taxes are levied payable in the future, but based upon a state of facts or income which existed or was realized in the past. In other words, the future tax was to be measured by a standard which had already been determined. A compendious consideration of this type of cases appears in the dissenting opinion of Mr. Justice Brandeis in *Untermeyer* v. *Anderson,* 276 U. S. 440. The principle which underlies all such cases, however, is thus stated in *Stockdale* v. *Insurance Companies,* 20 Wall. 323:

> "The right of Congress to have imposed this

> tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted, much less can it be doubted that it could impose such a tax on income of the current year, although part of that year had elapsed when that statute was passed."

Even in cases where the measure of future taxes was determined in the past, this Court has insisted that the law must be reasonable and not arbitrary in even this retrospective feature: *Untermeyer* v. *Anderson,* 276 U. S. 440; *Blodgett* v. *Holden,* 275 U. S. 142; *Schwab* v. *Doyle,* 258 U. S. 529; *Nicholas* v. *Coolidge,* 274 U. S. 531.

On the point of unreasonableness alone, we believe that legislation adopted in 1928 to impose taxes because of 1919 income, would be considered arbitrary or unreasonable. But in this case, the law, as suggested by the Court below, would go further, for it would authorize the Congress to adopt in 1928 a tax to be imposed upon taxpayers for the year 1920 based upon 1919 income and, of course, it would also permit the imposition of taxes upon numerous taxpayers for all of the years preceding 1928 in respect of their then past income. No case, so far as our research has disclosed, has gone so far as to warrant such legislation.

The one case in which such subject was discussed was *First National Bank* v. *Covington,* 103 Fed. 523. There the taxes assessed and collected from a national bank in respect of its stock had been declared invalid as being violative of Section 5219 of the United States Revised Statutes. The Legislature of Kentucky thereupon passed a law assessing this bank stock at a different rate (claimed to be equivalent to the rate imposed upon

other moneyed capital) for the years during which the bank stock tax had been invalidated.

The District Court wrote a learned opinion in which it was charged that the power to impose taxes for past years upon property not liable for taxation in those years, amounted to confiscation and the taking of property for public use without just compensation. The case came on appeal to this Court in 198 U. S. 100, where the judgment was affirmed, but upon another ground, *i. e.*, that the taxes might have been justified as being taxes upon the holders of the bank stock under pre-existing personal property taxes, but that under the facts in the case many of the stockholders were non-residents of Kentucky and, therefore, not subject to the tax. This Court, however, did not disapprove the principles announced by Judge Evans in the District Court.

Under the authorities it would seem that legislation attempting as late as 1928 to impose a new tax in the amount here collected for the year 1920, would have been invalid and unconstitutional.

IV. *There is no power in the Congress to take property without due process of law even when such taking may seem fair to the Court.*

We have seen that the District Court disposed of our contention upon the ground that the rule in *Campbell* v. *Holt* applies to the statutory liability for taxes, and further upon the ground that Sections 607 and 611 are ratifying statutes.

The Circuit Court of Appeals apparently did not adhere to this view, but rather took the view that merely out of considerations of fairness and reason, the plaintiff's property should be taken, and hence constitutional

limitations were inapplicable. Thus said the learned Circuit Court of Appeals (R. 38):

> "This is charged to be in violation of the Fifth Amendment, and so it might be, if there had been no original tax, no claim for abatement, no delay of the Treasury in the disposal of that claim, and a consequent loss of all remedies. Were the Fifth Amendment a remorseless pattern which all legislation must fit, the argument might even so be troublesome; might indeed be conclusive. But constitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction. They are not the rules of a game; their meaning is lost when they are treated as though they were. It is quite true that the section took away a defense from the plaintiff; he is right to complain unless we can question the kind of defense it was. The moment we do, it must appear to any fair person that he ought not to have it."

We have sought in vain for any determination of this Court which renders the constitutionality or unconstitutionality of a statute which takes property without due process of law, dependent upon the principles thus laid down; upon the sense of fairness and justice of the Court by which the constitutionality of the statute is being considered. Such arguments of fairness, justice and fair play might well also be invoked in favor of the widow who brings too late an action for the death of her husband by the defendant's wrongful act; or in favor of the creditor who seeks to recover his losses from directors of corporations; or in favor of subcontractors

who seek to hold sureties upon bonds written for the general contractor in consideration of premiums paid by the general contractor, and upon indemnity given by him. In all of these cases, an element of fairness, mutual forebearance and reason may be invoked upon the side of him who would obtain the property of his legal adversary contrary to the specific language of the Constitution. Nor is the entire argument of fairness and reasonableness upon the side of the Collector of Internal Revenue. The taxpayer may also invoke such arguments, for this Court in the *Albany Lighterage* case, referred to the "mischiefs to be remedied by setting a time limit against distraint"—mischiefs recognition of which animated the Congress in enacting the limitation statutes.

From a consideration of all of the decisions of this Court, the rule seems to result that constitutional limitations are dependent upon no such consideration; and that the Constitution having been adopted, those who live under the Government established by it must be content to have their rights adjudicated in accordance with its mandates, with full confidence that if its provisions are equally and strictly enforced, irrespective of hardship which may result in any individual case, the largest measure of public and private justice will be assured.

POINT IV.

The unconstitutional effect of Section 611 of the Revenue Act of 1928 may be avoided by applying its provisions only to claims for refund filed after the enactment of that statute.

The language of Section 607 with regard to which the provisions of Section 611 merely act as an exception, is purely prospective. It enacts that certain payments, theretofore or thereafter made *"shall be* considered an overpayment and *shall be* credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim". It is apparent from this section that the Congress had in mind the proper language to use in describing that which was past, as well as that which was to come, for, with regard to the date of payment it specifically provides "whether before or after the enactment of this Act". With regard to the date of filing the claim for refund, it merely provides "if claim therefor *is* filed". The language therefore is literally susceptible only of prospective construction.

The Court below found that in the case at bar, the claim for refund was filed April 27, 1927 (R. 13), prior to the enactment of the Revenue Act of 1928.

To apply Section 607 to a claim for refund which was filed prior to the enactment of the Act, is to strain at the language of the Section. Inasmuch as the filing of a claim for refund is a condition precedent to the bringing of a common law action against the Collector, it might be possible to sustain the constitutionality of these sections if they were applied purely to claims for

refund filed after the enactment of the Act, for until such condition precedent had been complied with, the right of action against the Collector had not fully matured.

The rule is well settled that where a statute is susceptible of prospective construction, that construction should be given to it, and if a statute is susceptible of such construction as will preserve existing rights of action, that construction will be given to it.

In the case of *U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, this Court, at page 314, said:

> "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied."

For the same principle, the Court is referred to *Texas Cement* v. *McCord*, 233 U. S. 157, 162; *Davidson* v. *Gibson*, 213 U. S. 10, 16; *Title etc. Co.* v. *Harlan & Hollingsworth*, 228 U. S. 567, 571.

So also will the construction be given to the statute which preserves existing rights of action. *Auffm' Ordt* v. *Rasin*, 102 U. S. 620.

CONCLUSION.

We therefore urge that Sections 607 and 611 have no application to the case at bar, for the reason that they apply only to administrative refunds and credits by the Commissioner of Internal Revenue, and not to actions at law against a collector; and further, for the reason that Section 611 in no case applies unless there has been a compulsory stay upon the Collector. If those sections, despite this reasoning, are held to apply, then they are unconstitutional as taking the plaintiff's property without due process of law. Nonetheless, validity might be given to these sections, by attributing to them a purely prospective effect so as to apply to claims for refund filed after the enactment of the 1928 Revenue Act. In such case, however, they would not cover the case at bar. The judgment appealed from should therefore be reversed.

Respectfully submitted,

ELKAN TURK,
HERMAN GOLDMAN,
ARTHUR ROTHSTEIN,
BENJAMIN WIENER,
DONALD BOURNE,
Counsel for Petitioner.

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CHARLES ELMORE

No. 463

In the Supreme Court of the United States

OCTOBER TERM, 1930

DANIEL REEVES, INC., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 463

DANIEL REEVES, INC., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The United States does not oppose the petition in this case.

The question presented is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (R. 22), should be construed to deprive the petitioner of the right which it otherwise would have had to recover taxes which had been collected after the statutory period of limitations had expired, and if so construed, whether it violates the Fifth Amendment.

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This question is the same as that involved in *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*, No. 36, October Term, 1930, certiorari granted, March 3, 1930; *Magee* v. *United States*, No. 65, October Term, 1930, certiorari granted, May 19, 1930; *Oak Worsted Mills* v. *United States*, No. 104, October Term, 1930, certiorari granted, June 2, 1930; and *Taft Woolen Company* v. *United States*, No. 105, October Term, 1930, certiorari granted, June 2, 1930, and several other cases now pending on petition for certiorari in which the Government has not opposed the petitions. The facts are substantially the same in the instant case as in those cases. In the instant case the suit was brought before the passage of the Revenue Act of 1928.

The pertinent dates in the instant case are as follows (R. 13-15, 16):

March 11, 1920, return for 1919 filed.

April 5, 1924, additional assessment made.

April 16, 1924, claim in abatement filed.

March 11, 1925, expiration of five-year period for assessment and collection of tax.

September 28, 1925, claim in abatement rejected.

November 14, 1925, tax collected.

April 27, 1927, claim for refund filed.

November 5, 1927, claim for refund rejected.

November 22, 1927, suit brought.

The Circuit Court of Appeals for the Second Circuit, affirming the judgment of the District

Court, held that Section 611 of the Revenue Act of 1928 barred recovery. (R. 34.)

Since the same question is already before this Court in several pending cases, the United States does not oppose the granting of the writ of certiorari.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
S. DEE HANSON,
Special Assistants to the Attorney General.

ERWIN N. GRISWOLD,
Attorney.

OCTOBER, 1930.

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Nos. 463, 529, 519, and 565

In the Supreme Court of the United States

OCTOBER TERM, 1930

DANIEL REEVES, INC., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

LAURA H. JENNINGS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERIC B. JENNINGS, DECEASED, PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EASTERN EQUITIES CORPORATION, FORMERLY BEARING THE CORPORATE NAME AMERICAN GLUE COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

WRIGHT & TAYLOR, INC., PETITIONER

v.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 463

DANIEL REEVES, INC., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

No. 529

LAURA H. JENNINGS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERIC B. JENNINGS, DECEASED, PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 519

EASTERN EQUITIES CORPORATION, FORMERLY BEARING THE CORPORATE NAME AMERICAN GLUE COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 565

WRIGHT & TAYLOR, INC., PETITIONER

v.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Circuit Court of Appeals in *Reeves* v. *Anderson* (R. 34) is not yet reported; the opinion of the District Court (R. 19) is reported *sub nom. Regla Coal Co.* v. *Bowers* in 37 F. (2d) 373.

The opinion of the Circuit Court of Appeals in *Jennings* v. *Anderson* (R. 28) is not yet reported. The District Court rendered no opinion.

The Circuit Court of Appeals rendered no opinion in *Eastern Equities Corp.* v. *United States*; the opinion of the District Court (R. 25) is not yet reported.

The opinion of the Circuit Court of Appeals in *Wright & Taylor, Inc.*, v. *Lucas* (R. 44) is not yet reported; the opinion of the District Court (R. 25) is reported in 34 F. (2d) 328.

JURISDICTION

Reeves v. *Anderson*, No. 463

The judgment of the Circuit Court of Appeals was rendered July 28, 1930. (R. 40.) The petition for certiorari was filed September 18, 1930. Certiorari was granted October 20, 1930. (R. 41.)

Jennings v. *Anderson*, No. 529

The judgment of the Circuit Court of Appeals was rendered July 28, 1930. (R. 28.) The petition for certiorari was filed October 27, 1930. (R. 36.) Certiorari was granted November 24, 1930. (R. 35.)

The judgment of the District Court. (R. 12) was rendered September 8, 1930. Appeal to the Circuit Court of Appeals for the First Circuit was allowed (R. 33) on September 15, 1930. The petition for certiorari was filed October 21, 1930, prior to the hearing and submission in the Circuit Court of Appeals. Certiorari was granted November 24, 1930. (R. 41.)

Wright & Taylor, Inc., v. *Lucas*, No. 565[1]

The judgment of the Circuit Court of Appeals was rendered November 10, 1930. (R. 44.) The petition for certiorari was filed November 28, 1930. Certiorari was granted December 8, 1930.

The jurisdiction of this Court in all of the cases is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The general question presented in all of the cases is: Where a tax is assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory period therefor has expired, does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid.

[1] The record references in this case are to the record filed with the petition for certiorari.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 14–15.

STATEMENT

In *Reeves* v. *Anderson*, No. 463, the petitioner filed its tax return for the year 1919 on March 11, 1920. (R. 12.) In March, 1924, the Commissioner of Internal Revenue assessed an additional tax. (R. 14.) On April 16, 1924, a claim in abatement of this additional tax was filed. (R. 14.) The five-year period for the collection of the additional tax expired on March 11, 1925. On September 28, 1925, the claim in abatement of the additional taxes was rejected. (R. 14.) On November 14, 1925, the additional tax was collected. (R. 13.) On April 27, 1927, the petitioner filed a claim for refund of the additional tax. (R. 13.) On November 5, 1927, this claim for refund was rejected (R. 14), and on November 22, 1927, this suit was commenced (R. 1).

In the other cases the material facts are as follows:

Jennings v. *Anderson*, No. 529

March 15, 1919—income and profits tax return for year 1918 filed. (R. 18.)

February 8, 1924—additional tax for 1918 assessed. (R. 18.)

February 25, 1924—claim for abatement of additional tax filed. (R. 19.)

March 15, 1924—five-year period for collection of additional 1918 tax expired.

August 14, 1924—claim for abatement of additional 1918 tax rejected. (R. 19.)

July 30, 1925—additional 1918 tax paid. (R. 19.)

September 19, 1925—claim for refund of additional 1918 tax filed. (R. 19.)

May 13, 1926—claim for refund rejected. (R. 19.)

December 6, 1927—suit commenced. (R. 1.)

May 29, 1928—Revenue Act of 1928 became law.

Eastern Equities Corp v. *United States*, No. 519

May 1, 1918—income and profits tax return for the year 1917 filed. (R. 5.)

September, 1920—additional income and profits tax for 1917 assessed. (R. 6.)

November 15, 1920—claim for abatement of part of additional tax filed. (R. 6.)

November 16, 1920—additional tax paid in part. (R. 6.)

May 1, 1923—five-year period for collection of additional tax expired.

August 18, 1924—claim for abatement of unpaid additional tax rejected. (R. 6.)

November 24, 1925—unpaid additional tax plus interest collected under warrant of distraint. (R. 7.)

December 31, 1925—claim for refund of additional tax plus interest filed. (R. 7.)

October 16, 1926—claim for refund rejected. (R. 7.)

May 29, 1928—Revenue Act of 1928 became law.

January 15, 1929—suit commenced. (R. 1.)

Wright & Taylor, Inc., v. *Lucas*, No. 565

June 17, 1919—income and profits-tax return for 1918 filed. (R. 22.)

August, 1919—assessment of additional tax for the year 1918. (R. 23.)

September 12, 1919—assessment of the tax shown on the return for 1918. (R. 23.)

September 15, 1919—claim for abatement of additional 1918 tax filed. (R. 23.)

December 13, 1923—waiver filed extending time for assessment. (R. 24.)

June 17, 1924—original five-year period for assessment and collection expired.

December 13, 1924—period for assessment and collection as extended by waiver expired.

September 8, 1925—additional 1918 tax plus interest collected. (R. 24.)

September 30, 1925—claim for refund filed. (R. 24.)

April 14, 1927—suit commenced. (R. 1.)

May 29, 1928—Revenue Act of 1928 became law.

ARGUMENT

It is the respondents' position that the facts of these cases bring them clearly within the terms of Section 611 of the Revenue Act of 1928 and that that section is a complete and effective defense to the suits herein. Section 611 provides in substance

that if a tax was within the period of limitation properly applicable thereto assessed prior to June 2, 1924, and if a claim in abatement was filed with or without bond and if the collection of any part thereof was stayed then the payment of such part (made before or within one year after the enactment of the Act) should not be considered as an overpayment under the provisions of Section 607 of the Act relating to payments made after the expiration of the period of limitation on assessment and collection.

In each of the instant cases the tax was assessed in time and before June 2, 1924. Claims for abatement were filed and the collections were delayed until after the claims were decided. The collections were made after the running of the statutory period of limitation therefor and before the enactment of the Revenue Act of 1926. The pertinent dates in each case are set forth in the statement. With regard to the application of Section 611 the material facts in each of the instant cases are the same as those in *Graham and Foster* v. *Goodcell*, now before this Court, No. 36, present term. In that case it is contended for the collector as respondent that Section 611 prevents recovery of any amount which had been assessed within time and prior to June 2, 1924, where a claim in abatement had been filed and collection stayed. The argument for the collector in the *Graham and Foster case* is equally applicable to the position of the respondent in each of the instant cases.

In *Daniel Reeves, Inc.*, v. *Anderson, Collector*, No. 463, and *Laura H. Jennings, Executrix*, v. *Anderson, Collector*, No. 529, it will be noted that the claim in abatement in each case was not rejected until after the applicable period of limitations had expired. Accordingly, the contention made by the petitioner in the *Graham and Foster case* that collection of the tax was not stayed by the claim in abatement for the additional reason that there remained a period of time after the rejection of the claim within which the collector might have collected is not available to the petitioners in these cases.

In *Wright & Taylor, Inc.*, v. *Lucas, Collector*, No. 565, the record does not show any rejection of the claim in abatement. In that case, the contention, made in all the cases, that collection was not stayed by the claim in abatement, is based upon the additional fact that the taxpayer filed a waiver of a period of limitation for assessment. It will be noted from the statement of facts that the waiver was filed more than four years after the making of the claim in abatement. The waiver period, which ran for less than six months after the expiration of the original five-year period, terminated while the claim in abatement was still pending, the collection meanwhile being stayed. From this it seems evident that the waiver had no effect on the stay of collection, which was attributable solely to the fil-

ing and consideration of the claim in abatement. The circumstance of the waiver has, therefore, no bearing upon the question presented in this case and in all the related cases.

In *Eastern Equities Corporation* v. *United States*, No. 519, as in *Daniel Reeves, Inc.*, v. *Anderson, Collector*, and *Laura H. Jennings* v. *Anderson, Collector*, the claim in abatement was not rejected until after the period for collection had run. Suit for recovery was instituted by the taxpayer after the enactment of the Revenue Act of 1928. The petitioner in the *Eastern Equities Corporation case* raises two points which have not been argued in the *Graham and Foster case*. It is our view that neither of these points presents such a material distinction as to require a different result from that which will be reached in the *Graham and Foster case*.

The first point is that, since the additional tax and interest was collected by actual distraint and seizure of the petitioner's money on deposit in a bank, such collection is not embraced within the terms of Section 611. We submit that it was the legislative intent in enacting Section 611 to retain all amounts collected, whether by voluntary payment or otherwise, where the collection was delayed by reason of the filing of a claim in abatement. It appears from the House Ways and Means Committee Report on Section 611 (set forth

in Appendix B, pp. 48–49 of the respondent's brief in the *Graham and Foster case*) that the section was enacted as a result of the decision of this Court which established the fact that collections made by distraint more than five years after the return were illegal, although prior to that decision it was supposed by the Treasury Department that there was no limitation on collection by distraint. The case referred to was *Bowers* v. *New York & Albany Co.*, 273 U. S. 346, which involved a collection by actual distraint. Since the *New York & Albany case* gave rise to Section 611 it seems apparent that in enacting the section Congress must have intended to embrace therein collections such as the one made in that case. Moreover if, as we contend, it was the legislative intent to retain in the Treasury amounts the collection of which had been delayed by a claim in abatement, there would seem to be no justification for permitting those who allowed the warrant of distraint to be executed to recover the amounts so collected and prohibiting recovery by those who paid either voluntarily or to avoid distraint.

We submit that Section 611 was intended to prevent recovery of all amounts collected after the statute of limitation had run when such collection was delayed by a claim in abatement and that the word "payment" is broad enough to cover a

satisfaction of the tax liability either by act of the taxpayer or distraint by the collector.

The second point raised by the petitioner and not argued in the *Graham and Foster case* relates to interest in the amount of $62,040.08 which was collected together with the tax after the statute of limitation had run. The petitioner contends that since the interest was not assessed prior to June 2, 1924, it is not embraced within the terms of Section 611. But interest in this case was collectible without assessment. Interest may be collected on Federal taxes even where there is no statutory provisions therefor. Cf. *Billings* v. *United States,* 232 U. S. 261. Here there is express statutory authority for the collection of interest upon the tax, where a claim in abatement was filed, from the time the tax was due until the claim is decided. Cf. Revenue Act of 1921, c. 136, 42 Stat. 227, 266, 267, Section 250 (e) (h). There is no requirement that the interest, as such, should be assessed. The rate of interest and the time for which it ran were fixed by the statute. It was collectible as a part of the tax without further action by the Commissioner. The amount of interest which is payable being dependent upon the correct amount of the tax and upon the duration of the consideration of the claim in abatement, it would be impossible as a practical matter to assess it prior to final action upon the claim. Accordingly, if Sec-

tion 611 were to be interpreted as contended by the petitioner to require the assessment of the interest as well as the tax it would require a practical impossibility and would impose a condition upon the collection of the interest which was not contemplated by the terms of the statute providing for its payment.

The interest so collected represents compensation to the Government for the delay in payment of the tax—for the forbearance to collect the tax when it is due. *Billings* v. *United States, supra; United States* v. *Childs,* 266 U. S. 304, 309–310. Since this delay was caused by the reconsideration of the assessment as a result of the taxpayer's claim in abatement, it is entirely proper that the amount of the compensation which the law authorizes for the delay should be retained as well as the tax itself. We submit that the retention of the tax assessed prior to June 2, 1924, authorized by Section 611 carries with it the right to retain the interest imposed by law which could not be assessed as a practical matter and which was collectible without assessment.

The petitioners in the instant cases have been supplied with copies of the Government's brief in the *Graham and Foster case.* To avoid repetition of the entire argument contained therein, we respectfully refer the Court to the brief filed for the Government in that case.

CONCLUSION

It is respectfully submitted that the judgments of the lower courts in the instant cases should be affirmed.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
NORMAN D. KELLER,
JOHN M. HUDSON,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

DECEMBER, 1930.

APPENDIX

Section 250 (e) (h) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 266, 267, provides:

> (e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of five per centum on the amount due but unpaid, plus interest at the rate of one per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of a bona fide claim for abatement filed within ten days after notice and demand by the collector, where the taxpayer has not had the benefit of the provisions of subdivision (d), such sum of five per centum shall not be added, and the interest from the time the amount was due until the claim is decided shall be at the rate of one-half of one per centum per month on that part of the claim rejected.
>
> * * * * *
>
> (h) The provisions of subdivisions (e), (f), and (g) of this section shall apply to the assessment and collection of taxes which have accrued or may accrue under the Revenue Act of 1917, the Revenue Act of 1918, or this Act.

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875 (U. S. C. Sup. III, Title 26, Secs. 2607, 2611, 2612) provides in part as follows:

SEC. 607 EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

* * * * *

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

SEC. 612. REPEAL OF SECTION 1106(a) OF 1926 ACT.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

U. S. GOVERNMENT PRINTING OFFICE: 1936

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 529

LAURA H. JENNINGS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERIC B. JENNINGS, DECEASED, PETITIONER,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 27, 1930

CERTIORARI GRANTED NOVEMBER 24, 1930

(35,451)

(35,451)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 529

LAURA H. JENNINGS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERIC B. JENNINGS, DECEASED, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

L. 41/214

LAURA H. JENNINGS, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased,

against

CHARLES W. ANDERSON, Individually and as United States Collector of Internal Revenue for the Third District of New York

STATEMENT UNDER RULE 13, PAR. 4

This suit was commenced, Dec. 6, 1927.
The names of the original parties remain the same.
Complaint filed, Dec. 31, 1927.
Answer filed, Jany. 27, 1928.
Trial was had, Sept. 10, 1929, before Hon. William I. Grubb, U. S. District Judge and a jury of one.
Verdict directed for plaintiff, Sept. 10, 1929.
Judgment entered, Oct. 11, 1929.
Appeal, on behalf of defendant, taken, Dec. 24, 1929.
Bill of exceptions, filed, Jany. 27. 1930.

[fols. 2 & 3] Summons, in usual form, omitted in printing.

[fol. 4] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

L. 41/214

LAURA H. JENNINGS, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased, Plaintiff,

vs.

CHARLES W. ANDERSON, Individually and as United States Collector of Internal Revenue for the Third District of New York, Defendant

COMPLAINT

The complaint of the plaintiff, by her attorneys, Miller & Chevalier, respectfully shows to this Court and alleges:
For a first cause of action:

I. That the plaintiff is and has been at all times since June 17, 1920, the duly appointed and acting executrix of the Last Will and Testament of Frederic B. Jennings, deceased.

II. On information and belief, that the defendant was at the time of the commission of the acts herein complained of, and is now the duly appointed and acting United States Collector of Internal Revenue for the Third District of New York.

[fol. 5] III. This is a suit of civil nature at common law where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000) and arises under the Constitution and Revenue Laws of the United States.

IV. That on or before March 15, 1919, Frederic B. Jennings duly and in good faith filed with the United States Collector of Internal Revenue for the Third Collection District of New York, his income tax return for the calendar year 1918, in accordance with the Revenue Acts of the United States then in effect, and, at the time of filing, paid to the said Collector the sum of $28,727.54, the amount of income tax liability indicated by the said return, which amount was assessed against said Frederic B. Jennings by the Commissioner of Internal Revenue shortly thereafter.

V. That said Frederic B. Jennings died on May 26, 1920.

VI. On information and belief, that on February 8, 1924, the Commissioner of Internal Revenue entered upon one of the assessment lists an alleged assessment against the estate of Frederic B. Jennings, then deceased, for an additional income tax for the said calendar year 1918 in the amount of $31,108.75.

VII. That on September 4, 1924, defendant addressed to the estate of Frederic B. Jennings, a notice and demand for the payment of the said alleged additional tax of [fol. 6] $31,108.75, and interest thereon, under threat of distraint in case the said additional tax and interest should not be paid on or before September 15, 1924.

VIII. That the plaintiff refused to comply with the said demand, on the ground that such additional assessment

and the collection thereof was barred by the provisions of the United States Internal Revenue Laws then in force.

IX. That thereafter, and under date of July 1, 1925, the defendant issued to a Deputy Collector of Internal Revenue for The Third District of New York, a warrant of distraint against the property of said Frederic B. Jennings' estate for the collection of the aforesaid additional taxes and interest, amounting to $35,087.25, by process of levy, by distraint and sale of said property.

X. That on July 8, 1925, defendant addressed to the estate of Frederic B. Jennings, a second notice and demand for the payment of the said alleged additional tax of $31,108.75 and interest thereon, under similar threat of distraint. A true copy of the said notice and demand is attached hereto and marked "Exhibit A."

XI. That on July 22nd, 1925, the plaintiff, under protest and solely because of the duress and threat of distraint by defendant, paid to defendant the said alleged additional tax of $31,108.75, plus interest thereon demanded in the sum of $3,978.50, making a total payment of $35,087.25.

XII. That on September 19, 1925, the plaintiff duly filed with the defendant a claim for refund of the said alleged [fol. 7] additional tax and interest; the Commissioner, by a letter addressed to the plaintiff, dated May 13, 1926, rejected the claim for refund in the principal amount of $31,108.75, stating that the matter of the collection of the interest thereon in the amount of $3,978.50 would be referred to defendant for adjustment; subsequently defendant refunded said interest, with interest thereon, but continues to refuse to refund the said principal amount of $31,108.75 or any part thereof. True copies of the said claim for refund and the said letter are attached hereto and marked respectively "Exhibit B" and "Exhibit C."

XIII. That no proceedings for the collection of said alleged additional assessment against said Frederic B. Jennings or his estate were had or taken within five years from the date of filing the aforesaid return of income taxes for the calendar year 1918, and at the time the said warrant of distraint was issued against the property of said Frederic B. Jennings' estate, more than five years had elapsed since the filing of said Frederic B. Jennings' said return.

XIV. On information and belief, that the aforesaid acts and proceedings of the defendant taken for the collection of the said alleged additional assessment were wrongful and unlawful and in violation of the plaintiff's rights, and that the said alleged additional tax was wrongfully and illegally collected from plaintiff.

Wherefore the plaintiff demands judgment against the defendant in the sum of $31,108.75, with interest thereon from July 22, 1925.

[fol. 8] For a second separate and distinct cause of action, plaintiff alleges:

XV. Plaintiff repeats and realleges all the allegations stated in paragraphs I, II, and III hereof.

XVI. That on or before March 15, 1920, said Frederic B. Jennings duly and in good faith filed with the defendant his income tax return for the calendar year 1919, in accordance with the Revenue Acts of the United States then in effect, and, at the time of filing, paid to the defendant the sum of $31,819.66, the amount of income tax liability indicated by the said return, which amount was assessed against said Frederic B. Jennings by the Commissioner of Internal Revenue shortly thereafter.

XVII. That said Frederic B. Jennings died on May 26th, 1920.

XVIII. That on May 17, 1924, the Commissioner of Internal Revenue entered upon one of the assessment lists an alleged assessment against said Frederic B. Jennings, personally, who was then deceased, for an additional income tax for the said calendar year 1919 in the amount of $46,287.04.

XIX. That on May 27, 1924, a notice and demand for the payment of the said alleged additional tax in the amount of $46,287.04, and interest thereon in the amount of $6,184.70, was addressed to said Frederic B. Jennings, who was then deceased, under threat of distraint in case the said additional tax and interest should not be paid on or before June 7, 1924.

[fol. 9] XX. That the plaintiff refused to comply with the said demand on the ground that, no such additional assessment was ever made against said Frederic B. Jennings in his lifetime nor against his estate after his death, and that such additional assessment and the collection thereof were barred by the provisions of the United States Internal Revenue Laws then in force.

XXI. That thereafter, and under date of July 1, 1925, the defendant issued to a Deputy Collector of Internal Revenue for the Third District of New York, a warrant of distraint against the property of said Frederic B. Jennings' Estate for the collection of the aforesaid additional taxes and interest, amounting to $52,471.74, by process of levy, by disstraint and sale of plaintiff's property.

XXII. That on July 8, 1925, defendant addressed to Frederic B. Jennings, who was then deceased, a second notice and demand for the payment of the said alleged additional tax and interest thereon, under similar threat of distraint. A true copy of the said notice and demand is attached hereto and marked "Exhibit D."

XXIII. That on July 22, 1925, the plaintiff, under protest and solely because of the duress and threat of distraint by the Commissioner, paid the said alleged additional tax of $46,287.04, plus interest thereon demanded in the sum of $6,184.70, making a total payment of $52,-471.74.

XXIV. That on September 19, 1925, the plaintiff duly filed with the defendant a claim for refund of the said alleged additional tax and interest; the Commissioner, by [fol. 10] a letter addressed to the plaintiff, dated May 13, 1926, rejected the claim for refund in the principal amount of $46,287.04, stating that the matter of the collection of the interest thereon in the amount of $6,184.70 would be referred to the defendant for adjustment; subsequently defendant refunded the said interest with interest thereon, but continues to refuse to refund the said principal amount of $46,287.04 or any part thereof. True copies of the said claim for refund and of the said letter are attached hereto and marked respectively "Exhibit E" and "Exhibit F."

XXV. That no such additional assessment was made against said Frederic B. Jennings in his lifetime nor against his estate after his death.

XXVI. That no proceedings for the collection of said alleged additional assessment against said Frederic B. Jennings or his estate were had or taken within five years from the date of filing said Frederic B. Jennings' aforesaid return of income taxes for the calendar year 1919, and at the time the said warrant of distraint was issued against the property of said Frederic B. Jennings' estate, more than five years had elapsed since the filing of said Frederic B. Jennings' said return.

XXVII. On information and belief, that the aforesaid acts and proceedings of the defendant taken for the collection of the said alleged additional assessment were wrongful and unlawful and in violation of the plaintiff's rights, and that the said alleged additional tax was wrongfully and illegally collected from plaintiff.

[fol. 11] Wherefore the plaintiff demands judgment against the defendant in the sum of $46,287.04, with interest thereon from July 22, 1925.

Miller & Chevalier, Attorneys for Plaintiff. Office and P. O. address: 111 Broadway, Borough of Manhattan, New York City.

[fol. 12] *Duly sworn to by Ewing Everett. Jurat omitted in printing.*

[fol. 13] EXHIBIT "A" TO COMPLAINT

Form 1-21a—Revised Jan. 1920

Income, War-profits, and Excess-profits Tax

Second Notice and Demand for Tax

United States Internal Revenue Service

Addl. 1918.
Comm. list Feb., 1924.
Spl. 2 #33.

Tax	$31,108.75
Int. at 6% from 2-15-24 to 8-14-24	933.26
9-4-24 to 7-8-25 @ 1%	3,045.24
	$35,087.25

Demand is hereby made for the payment of the taxes stated on this notice with a penalty of 5 per cent which has been incurred by failure to pay such taxes within the prescribed time. Beginning on the due date stated below, interest will also accrue at the rate of 1 per cent per month until paid. If payment of the tax, penalty, and interest is not received within ten days, the Act provides that collection with costs shall be made, by seizure and sale of property.

Due date 2-15-24.

Charles W. Anderson, Collector.

[fol. 14] To avoid seizure and sale of property this tax must be paid to Collector of Internal Revenue at 250 W. 57th St., N. Y., not later than 7-18-25.

Estate of Frederic B. Jennings c/o New York Trust Company, 100 Broadway, New York.

[fol. 15] Form 843—Jan., 1922

EXHIBIT "B" TO COMPLAINT

Treasury Department, Internal Revenue Service. Comptroller General U. S., January 18, 1922.

Claim for Refund of Taxes Illegally Collected

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Collector of Internal Rev., Third District, New York. Received Sep. 19, 1925. No remittance.

STATE OF NEW YORK,
County of New York, ss:

Estate of Frederic B. Jennings, c/o the New York Trust Company, 100 Broadway, New York, N. Y.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the

taxpayer named, and that the facts given below with reference to said statement are true and complete:

[fol. 16]

Period	Year
From Jan. 1	1918
To Dec. 31	1918

1. Business in which engaged: Decedent's Estate.

2. Character of assessment or tax (State for or upon what the tax was assessed or the stamps affixed): Income Tax and Interest.

3. Amount of alleged assessment: $35,087.25.

4. Reduction of Tax Liability requested (Income and Profits Tax): 35,087.25.

6. Amount to be refunded (or such greater amount as is legally refundable): 35,087.25*.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): July 22, 1925.

8. District in which return (if any) was filed: 3rd District of New York.

Deponent verily believes that this application should be allowed for the following reasons:

1. The collection of the above sum was barred by the statute of limitations and was illegally effected by threat of duress by the Collector of Internal Revenue for the 3rd Collection District of New York.

2. Interest was illegally collected upon the principal of the alleged additional income tax.

[fol. 17] 3. See statement attached for further details.

(Please address all correspondence c/o Miller & Chevalier, Southern Building, Washington, D. C.)

(Signed): S. B. Silleck, **Attorney in Fact for Laura H. Jennings in Her Capacity as Executrix of Estate of Frederic B. Jennings.

---

*Plus interest legally allowable.

**See copy of power of attorney attached hereto.

Sworn to and subscribed before me this 16 day of Sept., 1925. M. D. Thompson, Notary Public, N. Y. Co., No. 511. Reg. No. 7024.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

Estate of Frederic B. Jennings

Statement of Facts and Basis of Claim for Refund—1918

On July 22, 1925 the executrix of the Estate of Frederic B. Jennings paid under protest and threat of duress the sum of $35,087.25 to the Collector of Internal Revenue of the Third District of New York on account of additional [fol. 18] income taxes and interest thereon alleged to be due from the Estate of Frederic B. Jennings because of an alleged increased tax liability alleged to have been incurred during the lifetime of said Frederic B. Jennings.

The notice and demand received from the office of Collector Charles W. Anderson set forth the sum demanded as follows:

Tax	$31,108.75
Int. at 6% from 2-15-24 to 8-14-24	933.26
9-4-24 to 7-8-25 at 1%	3,045.24
	$35,087.25

It is respectfully submitted that the collection of the $35,087.25 as aforesaid was illegal, and a refund of said sum, together with such interest thereon as may be lawfully allowed, is requested.

The following are among the grounds for the claim with respect to the principal sum of $31,108.75:

1. The collection of the additional tax was barred by the statute of limitations, being specifically prohibited by Section 250(d) of the Revenue Act of 1918.

2. In 1918 Mr. Jennings was charged with $4,462.10 as interest by the brokerage house of H. P. Goldschmidt & Co., New York City, and credited by the same firm with the sum of $771.98 on account of interest accrued. This left a net charge of $3,690.12, which was not taken as a deduction

on the original return and which the Revenue Agent failed to allow. This item should be deducted from net income.

[fol. 19] The following are among the grounds for the claim with respect to interest:

1. The collection of the interest was barred by the statute of limitations, being specifically prohibited by Section 250-(d) of the Revenue Act of 1918.

2. There is no provision for interest on additional taxes claimed under the Revenue Act of 1918 until after assessment has been made.

3. Estates of deceased persons are specifically exempted from the interest provisions of the law by Section 250(e) of the Revenue Act of 1918.

Prior to any final determination with respect to this claim for refund an oral hearing is requested, and since it is highly desirable to have the affairs of the Estate settled as soon as possible, it would be greatly appreciated if the time for the conference could be fixed at as early a date as possible.

Respectfully, —— ——, Attorney in Fact for Laura H. Jennings in Her Capacity as Executrix of Estate of Frederic B. Jennings.

[fol. 20] EXHIBIT "C" TO COMPLAINT

IT:PA:PYA. ARM.

May 13, 1926.

Estate of Frederic B. Jennings, c/o New York Trust Company, 100 Broadway, New York, New York.

SIRS: Your claims for the refund of $35,087.25 and $52,-471.74, individual income taxes and interest for the years 1918 and 1919, respectively, have been examined.

The basis of your claims is the statement that the collection of the above sums was barred by the statute of limitations; that the 1919 assessment was illegal; and that interest was illegally collected upon the principal. It is also stated in the 1918 claim that the deduction against gross income for interest paid should be increased.

At the conference held in this office April 20, 1926, it was contended that inasmuch as deficiencies in tax were assessed against a taxpayer who is no longer in existence, the taxpayer having died, the collection of the taxes was barred by Section 250(d) of the Revenue Act of 1918.

It is disclosed that the deficiencies of $31,108.75 for 1918 and $46,287.04 for 1919 were assessed within the five-year period prescribed by law, and having been assessed within that period, they could then be collected within six years from the date of the assessments, in accordance with the provisions of Article 1272 of Regulations 65.

[fol. 21] The amount of the taxable net income for the year 1918 was determined by an investigation of the taxpayer's books of account and records, the results of which were set forth in the report of the Supervising Internal Revenue Agent at New York, New York, submitted to this office under date of December 18, 1923. The total deduction of $35,122.57, claimed in the return for interest paid, was allowed. No evidence has been submitted in substantiation of the claim that an additional amount of $3,690.12 should be allowed, and accordingly no change has been made in that item.

Your claims in regard to the above items will, therefore, be rejected by this office.

You are advised that the matter of the collection of interest, which was added to the amount of the deficiencies at the rate of 1% per month, will be referred to the Collector of Internal Revenue for your district for adjustment.

The rejection of your claims will officially appear on the next schedule to be approved by the Commissioner.

Respectfully, C. R. Nash, Assistant to the Commissioner, by —— ——, Head of Division.

ep-2.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The defendant, answering the complaint of the plaintiff herein, alleges as follows:

First. Denies that he has any knowledge or information sufficient to form a belief as to any of the allegations con-

tained in Paragraphs "I", "IV" and "V" of the plaintiff's complaint.

Second. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "VI" of the plaintiff's complaint, except that he admits that an asses-ment was duly made against this plaintiff for an additional tax of $31,108.75.

Third. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation [fol. 23] contained in paragraph "VII" of the plaintiff's complaint, except that he admits that a notice and demand for the payment of $31,108.75 was duly made upon this plaintiff.

Fourth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "VIII" and "IX", except that he admits that a warrant of distrain against the property of this plaintiff for the collection of the said tax and interest was duly issued to a Deputy Collector of Internal Revenue.

Fifth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "X", except that he admits that a second notice and demand for the payment of the said tax was duly made upon this plaintiff.

Sixth. Upon information and belief denies that the claim for refund was duly filed as is stated in paragraph "XII" of the plaintiff's complaint.

Seventh. On information and belief denies each and every allegation contained in paragraph "XIII" of the plaintiff's complaint.

Eighth. Denies each and every allegation contained in paragraph "XIV" of the plaintiff's complaint.

[fol. 24] As to a second alleged cause of action stated in the complaint the defendant answers the same as follows:

Ninth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "XVI" and "XVII" of the plaintiff's complaint.

Tenth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allega-

tion contained in paragraph "XVIII" of the plaintiff's complaint, except that he admits that an assessment was duly made against this plaintiff for an additional tax in the amount of $46,287.04.

Eleventh. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "XIX" of the plaintiff's complaint, except that he admits that notice and demand for the payment of additional tax was made upon this plaintiff.

Twelfth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "XX" and "XXI" of the plaintiff's complaint, except that he admits that a warrant of distraint duly issued against property of this plaintiff for additional taxes and interest amounting to $52,471.74.

Thirteenth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "XXII" of the plaintiff's [fol. 25] complaint, except that he admits that a second notice and demand for payment of said tax was duly made upon this plaintiff.

Fourteenth. Upon information and belief denies that the claim for refund was duly filed as is stated in paragraph "XXIV" of the plaintiff's complaint.

Fifteenth. Upon information and belief denies each and every allegation contained in paragraph "XXV" and "XXVI" of the plaintiff's complaint.

Sixteenth. Upon information and belief denies each and every allegation contained in paragraph "XXVII" of the plaintiff's complaint.

Wherefore defendant demands judgment and that the complaint herein be dismissed with costs.

Charles H. Tuttle, United States Attorney for the Southern District of New York, Attorney for the Defendant. Office and P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

[fol. 26] *Duly sworn to by Leon E. Spencer. Jurat omitted in printing.*

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING SECOND SEPARATE AND DISTINCT CAUSE OF ACTION—July 9, 1929

Upon reading and filing the annexed stipulation, wherein the attorneys for the plaintiff and the defendant in this action stipulate that the second cause of action purported to have been set forth in the complaint herein is governed by the case of Russell, et al. v. United States, decided by the Supreme Court of the United States on January 2, 1929, and that a certificate of over-assessment in the sum of $46,287.04 has been issued to the taxpayer herein, it is

[fol. 28] Ordered that the complaint in the above entitled suit in so far as it purports to set forth a second, separate and distinct cause of action be and the same hereby is dismissed without cost to either party.

Dated New York, N. Y., July 9th, 1929.

T. D. Thacher, United States District Judge.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE DISMISSAL OF SECOND CAUSE OF ACTION

It is hereby stipulated and agreed by and between the attorneys for Laura H. Jennings, as Executrix of the Last Will and Testament of Frederic B. Jennings, deceased, the plaintiff herein, and Charles W. Anderson, individually and as United States Collector of Internal Revenue for the Third District of New York, the defendant herein, that the second cause of action purported to have been set forth in the complaint is governed by the case of Russell, et al. v. United States, decided by the Supreme Court of the United States on January 2, 1929, and that inasmuch as a certificate of over-assessment in the sum of $46,287.04 has been issued in favor of the plaintiff in this action the complaint in the above entitled action in so far as the second, separate and distinct cause of action purported to be set forth therein is

[fol. 30] concerned shall be dismissed without cost to either party and that an order may be entered to that effect by either party without notice to the other.

Dated New York, N. Y., May 12, 1929.

Miller & Chevalier, Attorneys for Plaintiff. Charles H. Tuttle, U. S. Attorney, Attorney for Defendant.

Sir: You will please take notice that an Order, of which the within is a copy, was this day duly entered in the within-entitled action, in the office of the Clerk of the U. S. Dist. Ct., So. Dist. of N. Y.

Dated N. Y., July 9th, 1929.

Yours, etc., Charles H. Tuttle, U. S. Attorney, Attorney for Deft.

[fol. 31] In United States District Court for the Southern District of New York

L. 41/214

Laura H. Jennings, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased, Plaintiff,

vs.

Charles W. Anderson, Individually and as United States Collector of Internal Revenue for the Third District of New York, Defendant

Judgment

The issues of this action having been duly brought on for trial and tried before the Honorable William I. Grubb, District Judge, and attorneys for the plaintiff and attorney for the defendant having stipulated that the case might be tried with a jury of one, and at the close of the case each side would move for a direction of a verdict, and a jury of one having been duly impaneled and sworn, and the cause having proceeded to trial, and on September 11, 1929, at the close of the entire case each side having moved for a direction of a verdict, and the decision of the Court having been reserved, and thereafter, on September 27, 1929, the Court having directed a verdict for the plaintiff in the full amount

demanded in the complaint, and defendant's attorney hav-
[fol. 32] ing moved to set aside the verdict, and said motion having been denied by the Court, and the plaintiff's costs having been taxed at the sum of $30.25.

Now it is adjudged that the plaintiff, Laura H. Jennings, as Executrix of the Last Will and Testament of Frederic B. Jennings, deceased, recover of the defendant, Charles W. Anderson, individually and as United States Collector of Internal Revenue for the Third District of New York, the sum of $31,108.75, together with interest thereon to be computed at the rate of 6 per cent per annum from the 30th day of July, 1925, to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner of Internal Revenue in accordance with the provisions of Section 177 of the Judicial Code as amended by Section 615 of the Revenue Act of 1928, together with the costs of this action, said costs amounting to $30.25.

Judgment signed this 11th day of October, 1929.

Alex. Gilchrist, Jr., Clerk of U. S. District Court.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE--Filed Oct. 29, 1929

The plaintiff having commenced this action by personal service of the summons and complaint upon the defendant and defendant having appeared herein by the United States Attorney for the Southern District of New York, his attorney, and judgment having been entered herein on the 11th day of October, 1929, in favor of Laura H. Jennings, as Executrix of the Last Will and Testament of Frederic B. Jennings, deceased, and against the defendant Charles W. Anderson, individually and as United States Collector of Internal Revenue in the sum of $31,108.75, together with interest thereon to be computed at the rate of 6 per cent per annum from the 30th day of July, 1925 to the date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner of
[fol. 34] Internal Revenue in accordance with the provi-

DELIVER OR SEND THIS RETURN TO COLLECTOR OF INTERNAL REVENUE ON OR BEFORE MARCH 15, 1919.

DETACH AND KEEP WORK SHEET AND INSTRUCTION SHEET

T.M.R.

MAR 19 1923

Page 1 of Return

314156

Form 1040—UNITED STATES INTERNAL REVENUE SERVICE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000

FOR CALENDAR YEAR 1918

43911

(1)

(DO NOT WRITE IN THIS SPACE)

Examined by

Audited by

FIRST PAYMENT

$

Cashier's Stamp

CASH

CHECK ✓

M. O.

CERT. of DEP.

If the return is made for a part of the calendar year 1918, the time on which the period covered by the return is based must be plainly stated at the head of the return.

PRINT NAME AND ADDRESS PLAINLY BELOW

Frederic B. Jennings

86 Park Avenue

(Street and number or rural route)

New York City New York

(Post office and State)

1. Did you make a return for 1917? Yes 2. If so, what address did you give on that return? Same

3. To what Collector's office was it sent? (Give district or city and State.) Same

4. Give number, if any, assigned to you for 1917, if it does not appear in address at head of return.

5. Were you in 1918 married and living with wife (or husband)? Yes 6. If not, were you head of a family as defined in instructions under "Personal Exemption"?

7. How many dependent persons under 18 years of age, principally dependent upon you for support, are included in your family (exclusive) for whom you received credit in 1917 return? None

8. If you claim any additional exemption on account of dependent persons other than your children, what was their relationship to you? A U N T (Aunt)

9. Write "R" if this return is for a married person living with husband or wife; write "S" if it is for a single person or for a married person not living with husband or wife.

10. Did your wife (or husband) or minor child make a separate return? Yes (If so, give name and address entered at head of this return.) Laura H. Jennings 86 Park Avenue New York City

11. Enter below all unearned income received by (or accrued to) you during the year.

Class of Securities.	Principal.	Income.	Class of Securities.	Principal.	Income.
Bonds of State, etc., not exempt from tax			Interest on bonds, notes, and other interest-bearing obligations of individuals, associations, and corporations (except interest on bonds of the Fourth Liberty Loan)	350872.25	31087.50
Bonds of States, municipalities, etc., exempt from tax			Interest on bonds of the Fourth Liberty Loan		
Bonds of the United States issued prior to September 1, 1917			Dividends on stock of corporations		

12. State amount of stock dividends received by you on [illegible] has directly during the [illegible] ...

(a) Accumulated in 1917, $ ... (b) Accumulated in 1918, $ ... (c) Accumulated since February ... 1913, and ...

13. Enter in table below interest on Liberty Bonds and other obligations of the United States issued since September 1, 1917, received ... maximum amount of such obligations (par value) held at any one time from which such interest was derived ...

	Amount of Interest.	Maximum Amount of Obligations.	Amount of Interest.	Maximum Amount of Obligations.		
(a) First Liberty Loan converted into First Loan and Second Liberty Loan converted into Second Loan issued since January 1, 1919						
(b) First and Second Liberty Loans converted into Third Loan and Third Liberty Loan	5129.71	Same				
(c) First Liberty Loan converted into Fourth Loan						
(d) Third Liberty Loan		10000				
(e) Bonds of obligations issued since September 1, 1917						
Total	5129.71	290000				

INITIALS:

DATE:

AUDITED

14. Amount of earned income (maximum $30,000) limited to one and one-half times the amount of bonds of the Fourth Liberty Loan ... State here amount of bonds of the Fourth Liberty Loan originally subscribed for and still held ...

15. Enter in the table below income from partnerships, personal service corporations, and estates and trusts ...

Name of Partnership, Personal Service Corporation, or Trust.	Business carried on.	Amount received during year.	Capital Invested.	Net Income.	Interest on Liberty Bonds.	Interest on other Tax-Exempt Securities.	Other Income.
ABDUCED							
AIM REBOT- TO NOR		31105.75					
LATH CONTROL		582.14					
[illegible] ACTORIES		6					
[illegible] CO.		2.25					
(a) Totals as shown on Schedule A, page 2, under C)							
(b) Total as shown on 1917 return (see instructions, page 2, under C)							

(c) Amount of stock dividends (exclusive of dividends in 1918 rates (enter as 2) ... (d) Amount of stock dividends payable ... 1919 ...

Total Net Income Subject to Surtax.		Total Net Income Subject to Normal Tax.		Calculation of Tax.	
16. Item 1, page 2	102895.61	AT 1918 RATES.		33. Normal tax on first $4,000 of income	2000.00
17. Item 10 (a)	0	25. Net income shown on page 2, Item 1	9895.61	34. Normal tax on $ ...	00.35
18. Item 14 (b), column 2	0	26. Less personal exemption	2000.00	35. Normal tax on $ ...	0
19. Total (Items 16, 17, and 18)	102895.61	27. Balance	7895.61	36. Surtax on $ ... (from table in page 3 of instructions)	2810.19
20. Item 10 (b)	0	28. Amount subject to tax at 6% (not over $4,000)	4000.00	37. Surtax on $ ... (from table on page 3 of instructions)	0
21. Item 14 (c)	0	29. Balance subject to tax at 12%	3895.61	38. Total tax	2810.54
22. Total (Items 19, 20, and 21)	102895.61	AT 1917 RATES.		39. Credit for 25% of amount paid on account of taxes on profits, and on account of taxes on income from sources outside of the United States	700.00
23. Item 15 (a)	0	30. Amount of Item 11 (b), column 2		40. Income, war profits, and excess profits taxes paid to foreign countries and possessions of the United States	0
24. Item 14 (d)	0	31. Balance of personal exemption not used above (Item 27 less Item 28)		41. Balance of tax (Item 38 minus Items 39 and 40)	2810.54
25. Total net income (Items 21, 23, and 24)	102895.61	32. Balance subject to tax at 2%		42. Amount of tax paid at time of filing return	7181.87

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return in good faith, pursuant to the Revenue Act of 1918, and that all the gross income and income received by or accrued to me (or the person for whom this return is made) during the year 1918, and that all deductions and credits herein are allowable by law.

Sworn to and subscribed before me this 15th day of March 1919

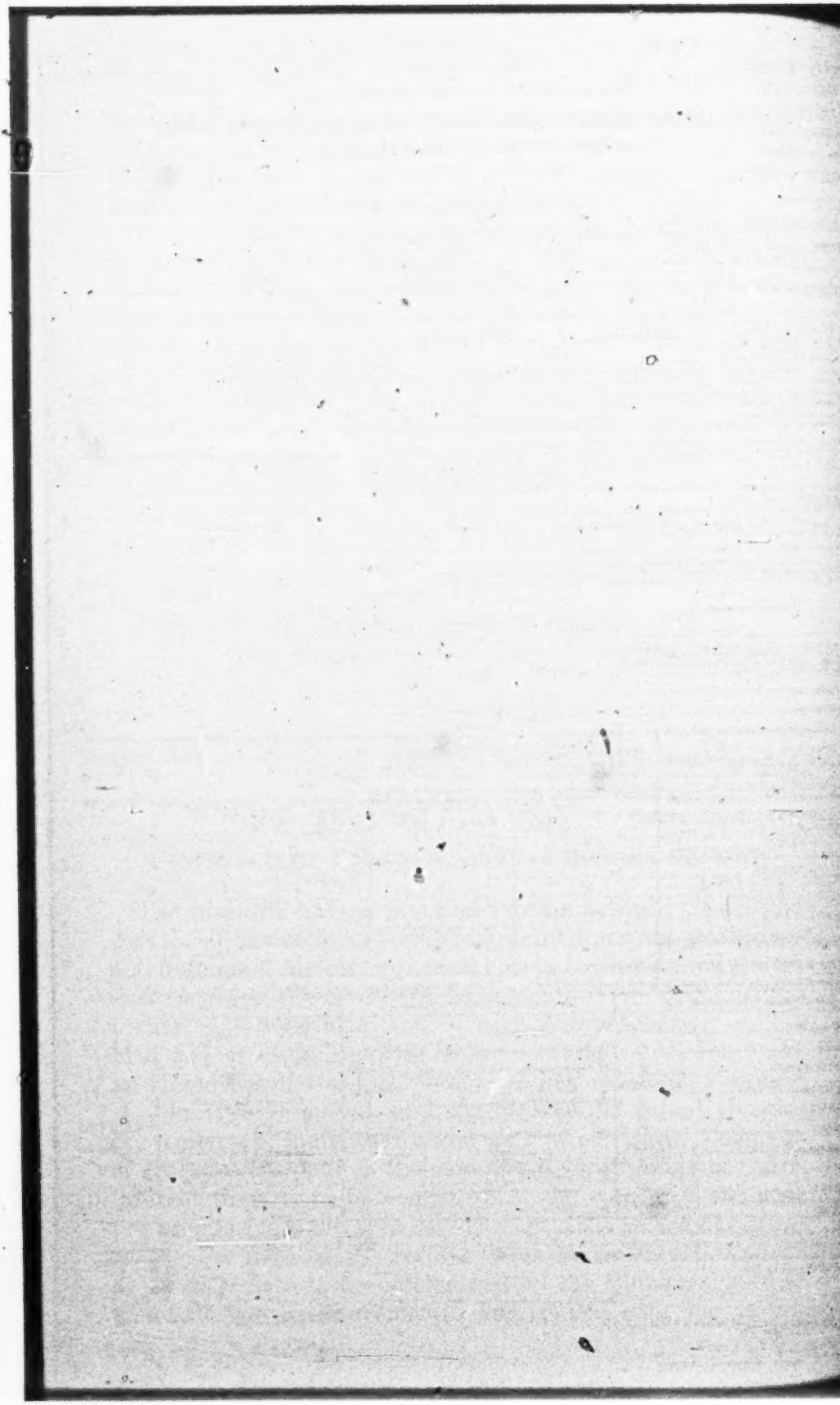
H. H. Bruder

(Signature of officer administering oath)

Frederic B. Jennings

86 Park Avenue New York

43-a



Page 3 of Return

RETURN OF INCOME TAXABLE AT 1918 RATES

A. INCOME FROM BUSINESS OR PROFESSION.

1. Kind of business ____ 2. Business address ____

3. Total sales and income from business or professional services ____

COST OF GOODS SOLD:

4. Labor ____
5. Material and supplies ____
6. Merchandise bought for sale ____
7. Other costs (submit schedule of principal items at foot of page or on separate sheet) ____
8. Total inventories at beginning of year ____
9. Total ____
10. Less inventories at end of year ____
11. Net Cost of Goods Sold ____

OTHER BUSINESS DEDUCTIONS:

12. Salaries and wages not reported as "Labor" under "Cost of Goods Sold" ____
13. Rent ____
14. Interest on business indebtedness ____
15. Taxes on business and business property ____
16. Repairs, wear and tear, obsolescence, depletion, etc.* property loses (explain in table below) ____
17. Bad debts arising from sales ____
18. Other expenses (submit schedule of principal items at foot of page or on separate sheet) ____
19. Total Other Business Deductions ____

20. Net Cost of Goods Sold Plus Other Business Deductions ____

21. Net Income from Business or Profession ____

B. INCOME FROM SALARIES, WAGES, COMMISSIONS, BONUSES, DIRECTOR'S FEES, AND PENSIONS.

1. Occupation.	2. Name and Address of Employer.	3. Gross Income.	4. Deductions, if any.	
Lawyer	Professional income 15 Broad St. Norfolk Va	$ 6478.00	$ 1827.00	
	Director Fees	288.00		
Net Income from Salaries, etc. (total of columns 3 minus total of column 4)		$ 6766.00	$ 1827.00	$ 5141

C. INCOME FROM PARTNERSHIPS, PERSONAL SERVICE CORPORATIONS, AND ESTATES AND TRUSTS not including interest on tax-free covenant bonds received through fiduciaries, which should be included in Item F; dividends, which should be included in Item G; and income exempt from taxation, which should be included in Item E(2), of income taxable at 1917 or 1918 rates—see taxable 16, page 2) ____

D. PROFIT FROM SALE OF LAND, BUILDINGS, STOCKS, BONDS, AND OTHER PROPERTY.

1. Date of Acquisition.	2. Year Acquired.	3. Name and Address of Purchaser or Broker.	4. Sale Price.	5. Original Cost or Market Value, March 1, 1913.	6. Cost or Basis (Cost Plus Improvements, if any)	7. Depreciation Subsequent to Acquisition.	
Net Profit from Sales (total of columns 4 and 7 minus total of columns 5 and 6)							

E. INCOME FROM RENTS AND ROYALTIES.

	1. Gross Income.	2. Deductions.	3. Net Income.	4. Interest Included in Net Income.
Net Income from Rents and Royalties (total of column 3 minus total of columns 1, 2, 6, and 7)	$ 2485.21	$ 262.21	$ 2223.00	$ 2223.31

F. INTEREST ON CORPORATION BONDS CONTAINING TAX-FREE COVENANT, ON WHICH A TAX OF 2% WAS PAID BY DEBTOR CORPORATION

(including that interest received through fiduciaries) ____ $ 400.00

G. OTHER INCOME (not including dividends, or interest on obligations of the United States).

	1. Gross Income.	2. Deductions, if any.
1. Interest on bonds, mortgages, and other obligations of domestic and resident corporations except as reported in Item F	$ 7430.00	
2. Interest on bonds of foreign countries and corporations and dividends on stock of foreign corporations		
3. Interest on bank deposits, mortgages, etc.		
4.		
5.		
Net Income (total of column 1 minus total of column 2)	$ 7430.00	$ 7430.00

H. TOTAL NET INCOME FROM ABOVE SOURCES ____ $ 65970.00

I. GENERAL DEDUCTIONS NOT INCLUDED ABOVE.

1. Interest paid or accrued	$ 3513.57	3. Losses by fire, storm, etc. (explain in table below)		5. Other deductions, if any (explain below)	
Taxes paid or accrued	896.40	4. Contributions (explain below)	1920.05	Total	$ 5330.02

1. Total net income on which normal tax is to be calculated at 1918 rates (H minus I) (enter as 25, page 2) ____ $ 9816.61

2(a). Dividends on stock of corporations organized or doing business in the United States (not including income from personal service corporations).

Received directly: $ 9816.61 received through partnerships, personal service corporations, and fiduciaries $ ____ Total ____ $ 9816.61

2(b). Taxable interest on bonds and other obligations of the United States issued after September 1, 1917 (see instructions, page 2) ____ 312.71

3. Total net income subject to surtax at 1918 rates (if the amount is $5,000 or less, make your return on Form 1040A, unless you had income taxable at 1917 or 1918 rates) ____ $ 10129.32

DATES IN THIS TABLE DETAILS CONCERNING REPAIRS, WEAR AND TEAR, PROPERTY LOSSES, ETC., CLAIMED AS DEDUCTIONS IN SCHEDULES A, E, AND I ABOVE.

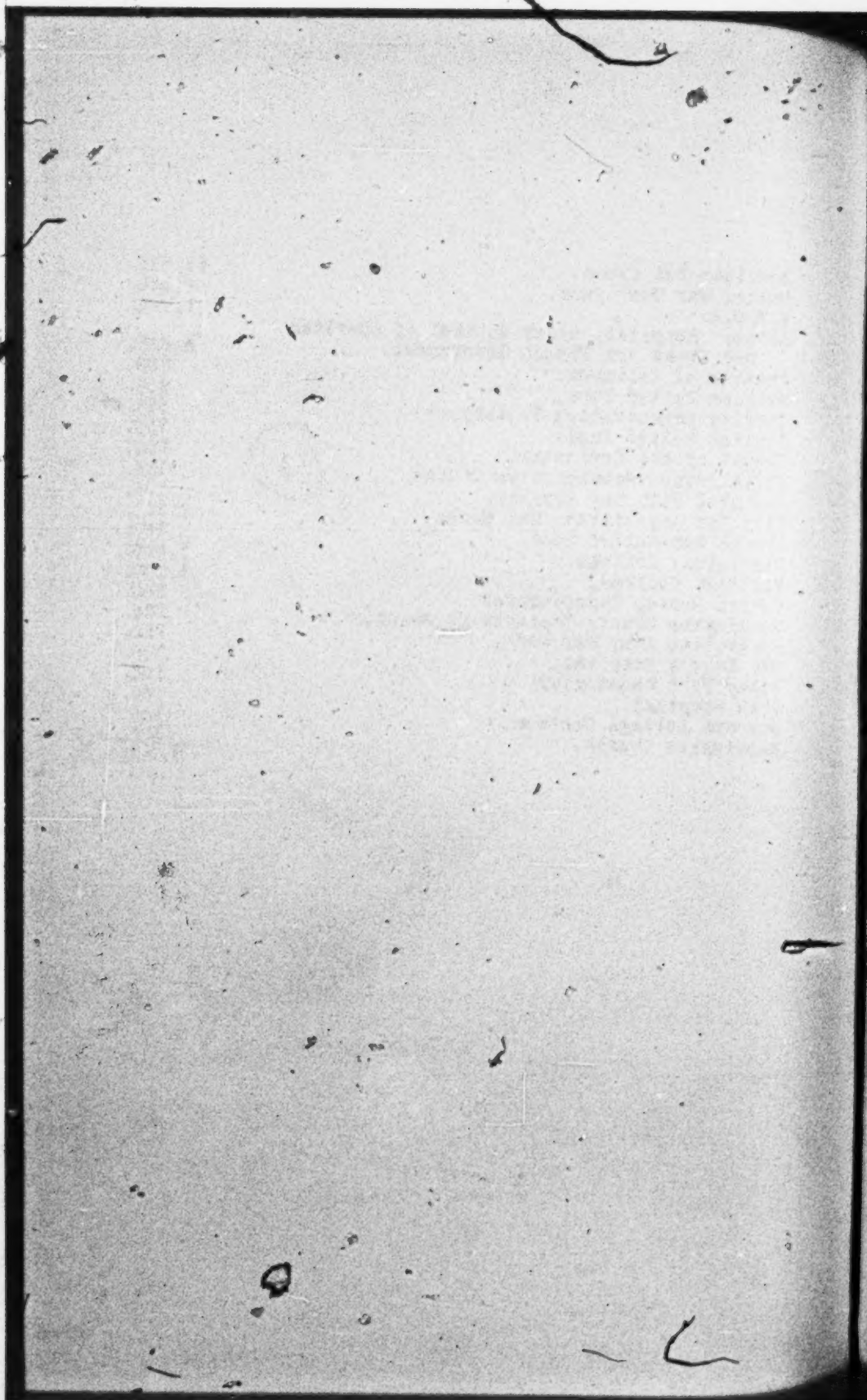
Item No.	1. Kind of Property or Business, State and Kilometer of Wear and Tear (Item)	2. Year Acquired.	3. Cost or Purchase Price or Market Value March 1, 1913.	4. Amount Claimed as Deduction for Wear and Tear and Losses.	When and Year Improvement and Depreciation Charged Off.		5. Amount Previously Allowed.	6. Total Deduction.	Amount Disallowed.
					6. Year.	7. Amount.			

EXPLANATION OF DEDUCTIONS claimed in Schedule A, Item 7 and 8; Schedule B, column 4; Schedule E, column 7; Schedule G, column 2; and Schedule ____

American Red Cross,	$4,675.
United War Work Fund,	4,010.
Y.M.C.A.	1,025.
Allies' Hospital, under control of American Red Cross and French Government,	5,065.
Knights of Columbus,	200.
Belgian Relief Fund,	953.
Charity Organization Society,	574.67
Italian Relief Fund,	750.
Chapel of the Comforter,	250.
Fifth Avenue Presbyterian Church,	110.
Prospect Hill Day Nursery,	150.
City Bar Association War Work,	1,500.
French War Relief Fund,	250.
Middlebury College,	5,000.
Williams College,	5,100.
Junior House, Incorporated,	300.
Bennington County Improvement Association,	225.
Salvation Army War Work,	250.
St. Luke's Hospital,	100.
Stony Wold Sanatorium,	100.
Park Hospital,	50.
Barnard College Canteen,	100.
Bennington Church,	300.
	31,032. X
	31137

(1)

43-0



582747

CLAIM FOR

[X] ABATEMENT OF TAX ASSESSED
[ ] CREDIT AGAINST OUTSTANDING ASSESSMENTS
[ ] REFUND OF TAXES ILLEGALLY COLLECTED
[ ] REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

IMPORTANT
[illegible] Collector of Internal Revenue [illegible] unsatisfied [illegible] not acceptable unless completely filled in.

COLLECTOR'S NOTATION
District
Amount number
Date received
5
Stamp here
Collector of Internal Revenue

State of New York
County of New York
1454

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

CLAIMS CONTROL
Stamp here

RECORDED
MAR 13 1924
CLAIMS CONTROL SECTION

TYPE OR PRINT

Estate of Frederick B. Jennings
(Name of taxpayer or [illegible])
(Laura H. Jennings, Executrix)
(Residence—give street and number as well as city or town and State)
c/o The New York Trust Company, 100 Broadway, New York City. N.Y.
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged Decedent's Estate 3 N.Y.
2. Character of assessment or tax Income Tax
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased $31,108.75
4. Reduction of Tax Liability requested (Income and Profits Tax) $31,108.75
5. Amount to be abated $31,108.75
6. Amount to be refunded (or such greater amount as is legally refundable) $
7. Dates of payment (see Collector's receipts or indorsements of canceled checks)
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed Third District of New York
9. District in which unpaid assessment appears Third District of New York
10. Amount of overpayment claimed as credit $
11. Unpaid assessment against which credit is asked; period from to $

PERIOD	YEAR
From January 1	1918
To December 31	1918

Deponent verily believes that this application should be allowed for the following reasons:

The additional assessment has been made against the Estate of Frederick B. Jennings because of the alleged additional tax liability of the decedent. The Revenue Agent's report upon which the additional assessment has been made was prepared subsequent to the date of decedent's death and purports to show certain additional items of income, the failure to report which could be satisfactorily explained were decedent alive today.

Attached hereto is a copy of a letter from the Bureau of Internal Revenue dated January 26, 1924, under authority of which this statement is submitted.

Exceptions to the findings of the Income Tax Unit will be forwarded to the Bureau in Washington.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 25th day of February, 1924

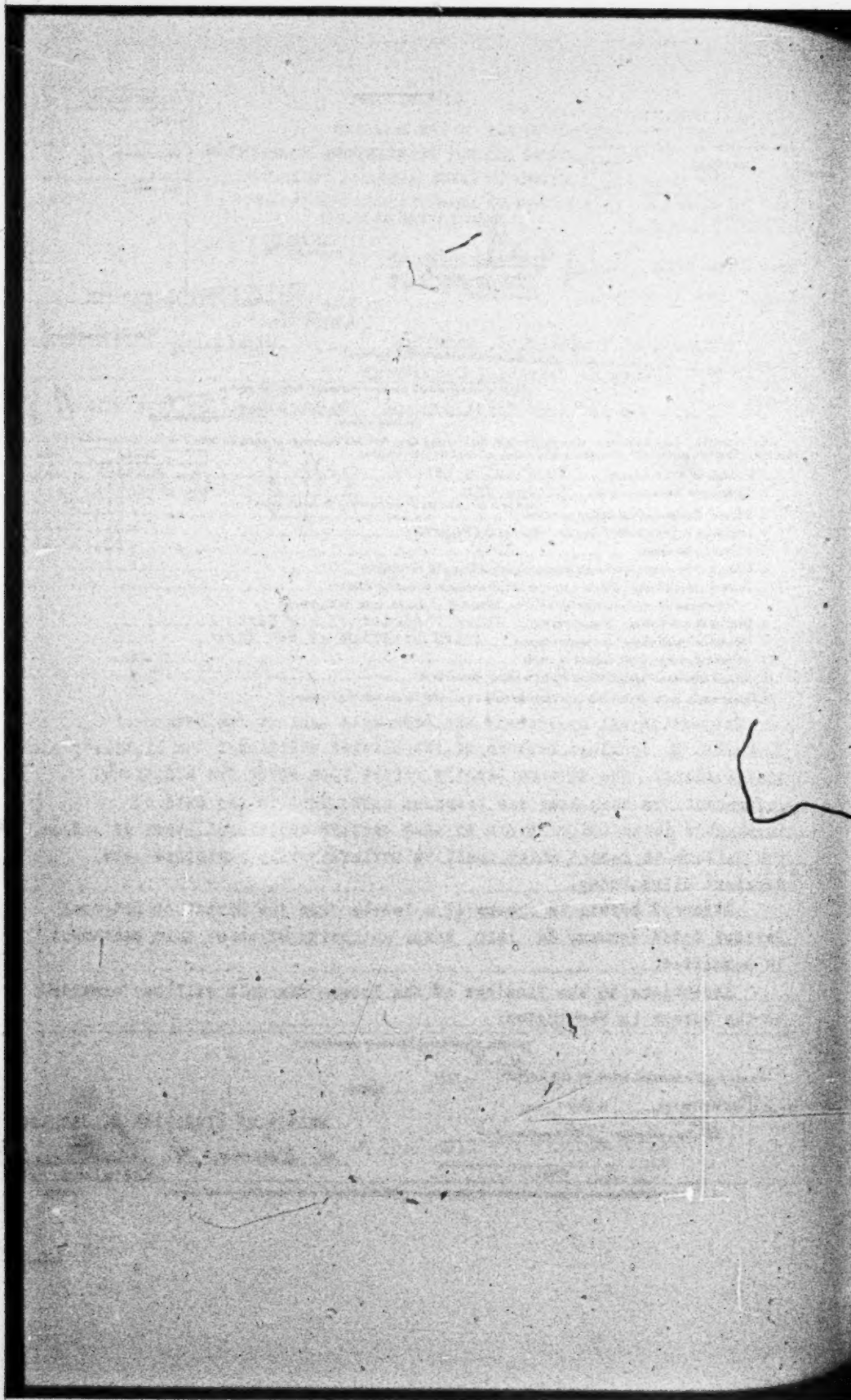
Signed:

Estate of Frederick B. Jennings,
By: Laura H. Jennings
Executrix.

[illegible]
NEW YORK (Title)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

44-a



CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxation.	Character of assessment and period covered.	Lbs.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
							$		

REJECTED
2687

Collector of Internal Revenue

Assessment Clerk, Commissioner's Off.

Schedule No.

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number	Period commencing

1918

Claim No.

Collector ..... District

Schedule Number ..... District 3-Ky

Allowed or Rejected Number .....

Claimant Jennings Est., Fred P. B

Address .....

Examined and submitted for action 19

COMMITTEE ON CLAIMS

Claim examined by— [illegible] 6-16-24

(Claim approved) —

Chief of Division.

Amount claimed $ 31,108.75

Amount allowed $ None

Amount rejected $ 31,108.75

44-b

(COPY)

TREASURY DEPARTMENT

Washington

Office of
Commissioner of Internal Revenue

January 26, 1924.

IT:PA:2
LLC-202-App

The New York Trust Co.
100 Broadway,
New York, N. Y.

Estate of Frederick B. Jennings,
Mrs. Laura H. Jennings, Executrix.

Sirs:

An examination of the income tax return filed for 1918 by Frederick B. Jennings, 86 Park Avenue, New York, New York, has been made and the results thereof are outlined in the attached statement.

You are advised that in order that the collection of this tax may not be jeopardized by the delay incident to the giving of the usual thirty days notice, as provided for in Section 250(d) of the Revenue Act of 1921, an immediate assessment by the Commissioner of Internal Revenue will be made. The Bureau will, however, entertain a claim in abatement if filed within ten days after the receipt of notice and demand from the Collector of Internal Revenue for your district, in accordance with the provisions of Article 1006 of Regulations 62.

An appeal covering the basis of the claim should be filed, setting forth in full all information upon which you base your protest against the above assessment and any additional facts in support of your claim. If an appeal is not filed, payment should be made upon receipt of notice and demand from the Collector of Internal Revenue of your district.

Respectfully,

J. C. Bright,

Deputy Commissioner.

By (Signed) A. Lewis,

Head of Division.

Enclosure:
Statement.

44-C

MAILED

MAY 23 1924

ORIGINAL MAILED TO TAXPAYER.

IT:PA:2;
LHD-205

Mrs. Laura H. Jennings,
Executrix, Estate of Frederick B. Jennings,
100 Broadway,
New York, New York.

Madam:

Your claim for the abatement of $31,108.75 individual income tax for the year 1918 has been examined and will be rejected in full.

The basis of your claim is that certain additional items of income that the decedent failed to report could be satisfactorily explained if he were alive today.

In this connection you are advised that in view of the fact that no additional information has been submitted to warrant a change from the previous examination, the agent has been sustained by this office.

The Collector of Internal Revenue for your district will be officially notified of the adjustment at the expiration of thirty days from the date of this letter unless prior to that time evidence is furnished showing the adjustment is incorrect.

Under no circumstances should payment of the amount rejected be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

Respectfully,

J. G. BEIGHT,

Deputy Commissioner.

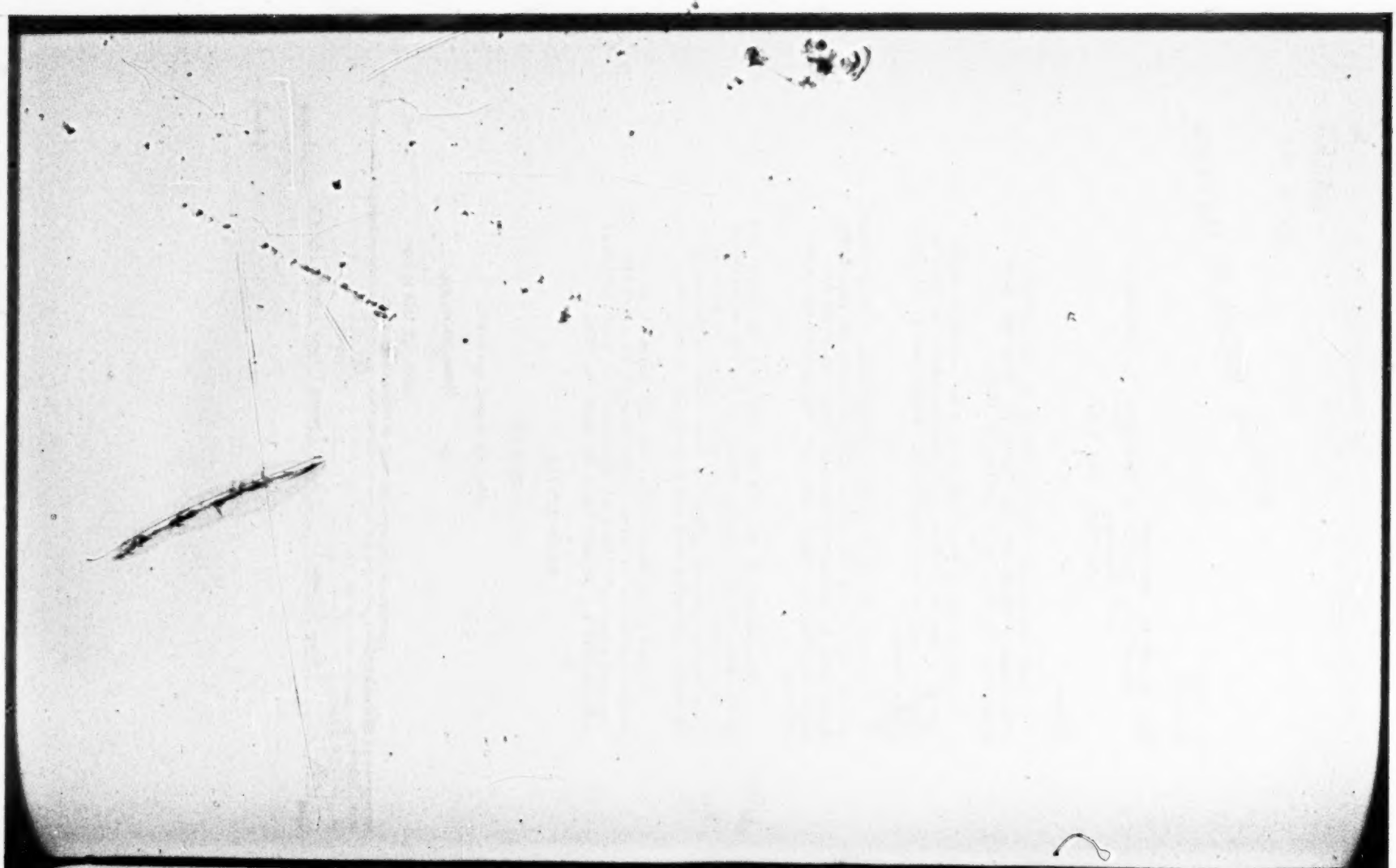
By Signed, Albert Lewis

Head of Division

EACH REVIEW AND APPROVAL MUST BE INITIALED AND DATED

			Subsec.	Section		Subdiv.	Division	Review	Solicitor	Hd. of U.	

44-d



ARTMENT
[illegible]
[illegible] U.S.
January 16, 1925

CLAIM FOR

OK

- [ ] ABATEMENT OF TAX ASSESSED
- [ ] CREDIT AGAINST OUTSTANDING ASSESSMENTS
- [X] REFUND OF TAXES ILLEGALLY COLLECTED
- [ ] REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

COLLECTOR'S NOTATION
Date
Account number
Date received

State of NEW YORK
County of NEW YORK

1454

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

RECEIVED
2 SEP 19 1925

Estate of Frederic B. Jennings
(Name of Taxpayer or Claimant)

TYPE OR PRINT

c/o The New York Trust Company
(Residence, give street and number or [illegible])

100 Broadway, New York, N. Y.
(Business address)

929849

This deponent, being duly sworn according to law, deposes and says that this statement is made [illegible] taxpayer [illegible] and that the facts given below with reference to said statement are true and complete.

MAR 11 1926

1. Business in which engaged	Decedent's Estate	Jan. 1	1918
2. Character of assessment or tax	Income Tax and Interest	Dec. 31	1918
3. Amount of ~~assessment or stamps purchased~~ alleged		$ 35,087.25	
4. Reduction of Tax Liability requested: Income and Profits Tax		$ 35,087.25	
5. Amount to be abated		$	
6. Amount to be refunded (or such greater amount as is legally refundable)	34,108.75 + Int.	$ 35,087.25*	
7. Dates of payment (see Collector's receipts or indorsements of canceled checks)	July 22, 1925		
(If statement covers income tax liability, items 8-11, inclusive, must be answered)			
8. District in which return (if any) was filed	3rd District of New York		
9. District in which unpaid assessment appears			
10. Amount of overpayment claimed as credit		$	
11. Unpaid assessment against which credit is asked, period from		$	

Deponent verily believes that this application should be allowed for the following reasons:

1. The collection of the above sum was barred by the statute of limitations and was illegally effected by threat of duress by the Collector of Internal Revenue for the 3rd Collection District of New York.

2. Interest was illegally collected upon the principal of the alleged additional income tax.

3. See statement attached for further details.

(Please address all correspondence c/o Miller & Chevalier, Southern Building, Washington, D. C.)

RECEIVED
FEB 20 1926

(Attach additional sheets if necessary)

Sworn to and subscribed before me this 16 day of September, 1925

M. D. Thompson
Notary Public, N. Y. Co. No. [illegible]
Certified in Kings [illegible]

Signed: [signature]
Attorney in fact for Laura H. Jennings in her capacity as Executrix of Estate of Frederic B. Jennings.

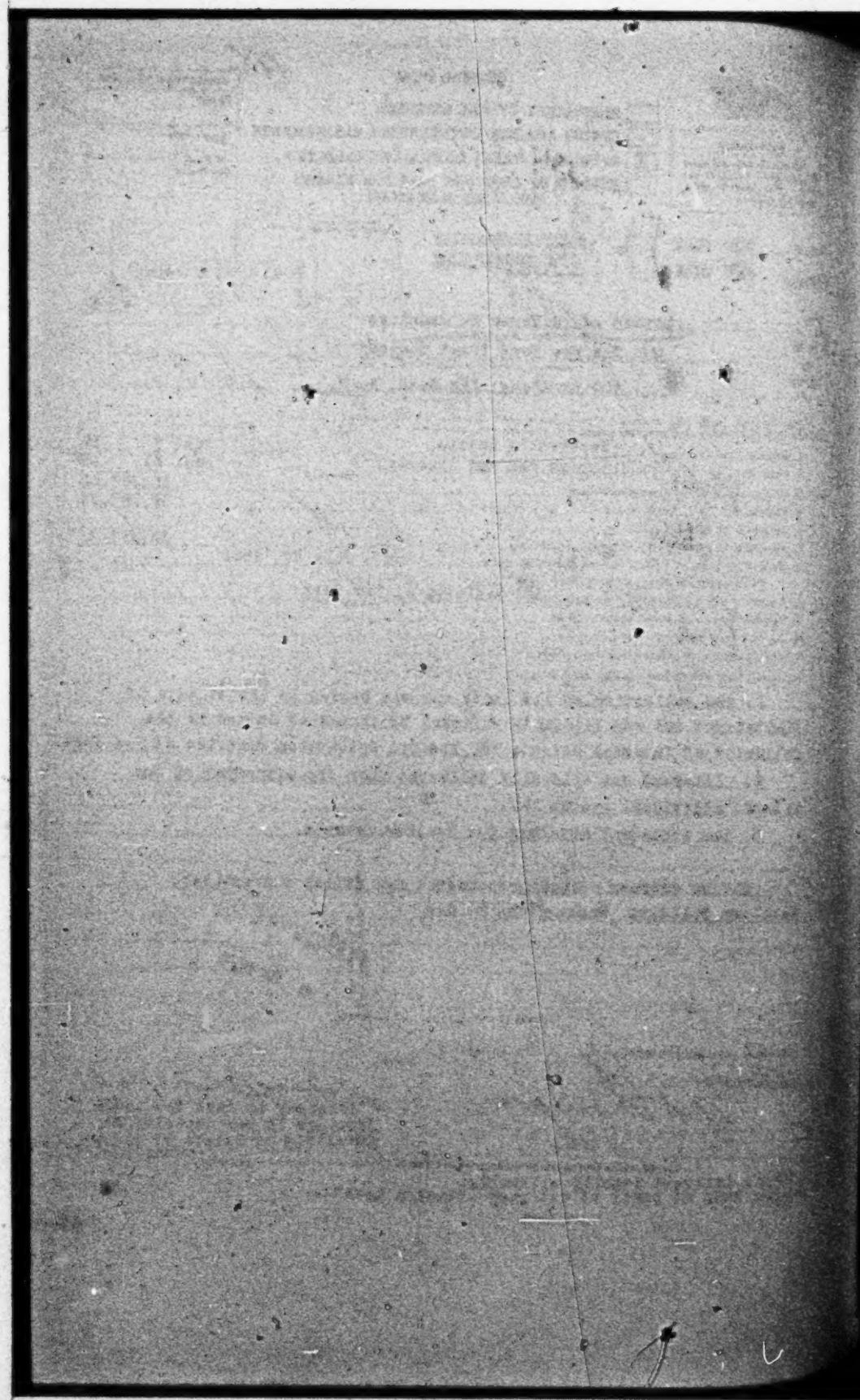
(This [illegible] may be [illegible] Collector of Internal Revenue or Revenue Agent without charge)

OCT 24 1925

*Plus interest legally allowable.
**See copy of power of attorney attached hereto.

C 3

45-a



CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxpayer.	Number of assessment and period covered.	Kind.	Year.	Month.	Page.	Line.	Amount.		Date paid.	Receipt in which paid.
							$			

Schedule No.

Collector of Internal Revenue.

Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.		If spoiled tax stamp, state: Total number.	Period covered by
					$			

Claimant

Claimant

Collector _____, District _____

Claim No.

REJECTED
5329
I T SCHEDULE

Schedule Number _____

Allowed or Rejected Number _____

District _____

(Signature of Sec.)

Claimant _____

Address _____

Examined and submitted for action _____, 19__

Claim examined by—

Claim reviewed by—

Chief of Division

Amount claimed $ 35087.25

Amount allowed $

Amount rejected $ 35087.25

SUBMITTED ON CLAIMS

46-b

ESTATE OF FREDERIC B. JENNINGS

Statement of Facts and Basis of Claim for Refund—1918

On July 22, 1925 the executrix of the Estate of Frederic B. Jennings paid under protest and threat of duress the sum of $35,087.25 to the Collector of Internal Revenue of the Third District of New York on account of additional income taxes and interest thereon alleged to be due from the Estate of Frederic B. Jennings because of an alleged increased tax liability alleged to have been incurred during the lifetime of said Frederic B. Jennings.

The notice and demand received from the office of Collector Charles W. Anderson set forth the sum demanded as follows:

Tax	$31,108.75	
Int. at 6% from 2/15/24 to 8/14/24	933.26	
9/4/24 to 7/8/25 at 1%	3,045.24	$35,087.25

It is respectfully submitted that the collection of the $35,087.25 as aforesaid was illegal, and a refund of said sum, together with such interest thereon as may be lawfully allowed, is requested.

The following are among the grounds for the claim with respect to the principal sum of $31,108.75:

1. The collection of the additional tax was barred by the statute of limitations, being specifically prohibited by Section 250(d) of the Revenue Act of 1918.

2. In 1918 Mr. Jennings was charged with $4,462.10 as interest by the brokerage house of H. P. Goldschmidt & Co., New York City, and credited by the same firm with the sum of $771.98 on account of interest accrued. This left a net charge of $3,690.12, which was not taken as a deduction on the original return and which the Revenue Agent failed to allow. This item should be deducted from net income.

The following are among the grounds for the claim with respect to interest:

1. The collection of the interest was barred by the statute of limitations, being specifically prohibited by Section 250(d) of the Revenue Act of 1918.

2. There is no provision for interest on additional taxes claimed under the Revenue Act of 1918 until after assessment has been made.

3. Estates of deceased persons are specifically exempted from the interest provisions of the law by Section 250(e) of the Revenue Act of 1918.

Prior to any final determination with respect to this claim for refund an oral hearing is requested, and since it is highly desirable to have the affairs of the Estate settled as soon as possible, it

would be greatly appreciated if the time for the conference could be fixed at as early a date as possible.

Respectfully,

Attorney in fact for Laura B. Jennings, in her capacity as Executrix of Estate of Frederic B. Jennings.

sions of Section 177 of the Judicial Code as amended by Section 615 of the Revenue Act of 1928, together with the costs of this action, said costs amounting to $30.25.

Now, therefore, pursuant to Section 989 of the Revised Statutes of the United States, I hereby certify that there was probable cause for the acts done by the defendant, the Collector of Internal Revenue, wherefore said judgment is due and recoverable against him.

Dated New York, October 29, 1929.

Woolsey, U. S. D. J.

Consented to.

Miller & Chevalier, Attorneys for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

[fol. 35] In United States District Court, Southern District of New York

L. 41/214

Laura H. Jennings, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased, Plaintiff,

vs.

Charles W. Anderson, Individually and as United States Collector of Internal Revenue for the Third District of New York, Defendant

Defendant's Bill of Exceptions and Order Settling Same

Caption

Be it remembered that this cause came on to be heard at a stated term of this Court begun and holden in the City of New York in and for the Southern District of New York on the 11th day of September, 1929, before the Honorable William I. Grubb and a jury of one, upon an agreed stipulation of facts and exhibits offered by the defendant, the plaintiff appearing by Miller & Chevalier, and the defendant appearing by Charles H. Tuttle, United States Attorney, Southern District of New York, Leon E. Spencer, Assistant United States Attorney, of counsel.

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto and by their respective attorneys, that the [fol. 36] following facts shall be taken as true for the purposes of this proceeding; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

I. That the plaintiff, Laura H. Jennings, is and has been at all times since June 17, 1920, the duly appointed and acting executrix of the Last Will and Testament of Frederic B. Jennings, deceased.

II. That the defendant was at the time of the commission of the acts herein complained of, and is now the duly appointed and acting United States Collector of Internal Revenue for the Third District of New York.

III. That this is a suit of civil nature at common law where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000) and arises under the Constitution and Revenue Laws of the United States.

IV. That on or before March 15, 1919, Frederic B. Jennings in good faith filed with the United States Collector of Internal Revenue for the Third Collection District of New York his income tax return for the calendar year 1918, and, at the time of filing, paid to the said Collector the sum of $28,727.54, the amount of income tax liability indicated by the said return, which amount was assessed against said Frederic B. Jennings by the Commissioner of Internal Revenue shortly thereafter.

[fol. 37] V. That said Frederic B. Jennings died on May 26, 1920.

VI. That on February 8, 1924, the Commissioner of Internal Revenue entered upon one of the assessment lists an alleged assessment against the estate of Frederic B. Jennings, then deceased, for an additional income tax for the said calendar year 1918 in the amount of $31,108.75.

VII. That on February 15, 1924, defendant addressed to the estate of Frederic B. Jennings, a notice and demand for the payment of the said alleged additional tax of $31,108.75, and interest thereon, under threat of distraint in case the said additional tax and interest should not be paid within ten days.

VIII. That the plaintiff refused to comply with the said demand, that a claim in abatement was filed on February 25, 1924, that said claim was rejected on August 14, 1924, and a second notice and demand for payment was issued on September 4, 1924.

IX. That thereafter, and under date of July 1, 1925, the defendant issued to a Deputy Collector of Internal Revenue for the Third District of New York a warrant of distraint against the property of said Frederic B. Jennings' estate for the collection of the aforesaid additional taxes and interest, amounting to $35,087.25, by process of levy, by distraint and sale of said property.

X. That on July 8, 1925, defendant addressed to the estate of Frederic B. Jennings, a further notice and de-
[fol. 38] mand for the payment of the said alleged additional tax of $31,108.75 and interest thereon, under similar threat of distraint. A true copy of said notice and demand is attached to the complaint in this action and marked "Exhibit A".

XI. That on July 30, 1925, the plaintiff under protest and solely because of the duress and threat of distraint by defendant, paid to defendant the said alleged additional tax of $31,108.75, plus interest thereon demanded in the sum of $3,978.50, making a total payment of $35,087.25.

XII. That on September 19, 1925, the plaintiff duly filed with the defendant a claim for refund of the said alleged additional tax and interest; the Commissioner, by a letter addressed to the plaintiff dated May 13, 1926, rejected the claim for refund in the principal amount of $31,108.75, stating that the matter of the collection of the interest thereon in the amount of $3,978.50 would be referred to defendant for adjustment; subsequently defendant refunded said interest, with interest thereon, but continues to refuse to refund the said principal amount of $31,108.75 or any

part thereof. True copies of the said claim for refund and of the said letter are attached to the complaint in this action and marked respectively "Exhibit B" and "Exhibit C".

XIII. That on or before March 15, 1920, said Frederic B. Jennings in good faith filed with the defendant his income tax return for the calendar year 1919, and, at the time of filing, paid to the defendant the sum of $31,819.66, the [fol. 39] amount of income tax liability indicated by the said return, which amount was assessed against said Frederic B. Jennings by the Commissioner of Internal Revenue shortly therafter.

XIV. That on May 17, 1924, the Commissioner of Internal Revenue entered upon one of the assessment lists an alleged assessment against said Frederic B. Jennings personally, who was then deceased, for an additional income tax for the said calendar year 1919 in the amount of $46,287.04.

XV. That on May 27, 1924, a notice and demand for the payment of the said alleged additional tax in the amount of $46,287.04, was addressed to said Frederic B. Jennings, who was then deceased, under threat of penalty and interest in case the said additional tax should not be paid on or before June 7, 1924.

XVI. That thereafter, and under date of May 20, 1925, the defendant issued to a Deputy Collector of Internal Revenue for the Third District of New York, a warrant of distraint against the property of said Frederic B. Jennings' estate for the collection of the aforesaid additional taxes and interest, amounting to $52,471.74, by process of levy, by distraint and sale of plaintiff's property.

XVII. That on July 8, 1925, defendant addressed to Frederic B. Jennings, who was then deceased, a second notice and demand for the payment of the said alleged additional tax and interest thereon, under threat of distraint. A true copy of the said notice and demand is attached to the complaint in this proceeding and marked "Exhibit D".

[fol. 40] XVIII. That on July 30, 1925, the plaintiff under protest and solely because of the duress and threat of dis-

traint by the Commissioner, paid the said alleged additional tax of $46,287.04, plus interest thereon demanded in the sum of $6,184.70, making a total payment of $52,471.74.

XIX. That on September 19, 1925, the plaintiff duly filed with the defendant a claim for refund of the said alleged additional tax and interest; the Commissioner, by a letter addressed to the plaintiff dated May 13, 1926, rejected the claim for refund in the principal amount of $46,287.04, stating that the matter of the collection of the interest thereon in the amount of $6,184.70 would be referred to the defendant for adjustment; subsequently defendant refunded the said interest, with interest thereon, but continues to refuse to refund the said principal amount of $46,287.04 or any part thereof. True copies of the said claim for refund and of the said letter are attached to the complaint herein and marked respectively "Exhibit E" and "Exhibit F".

XX. That at the time when the aforesaid warrant of distraint for the alleged additional taxes claimed for the year 1918 was issued, more than five years had elapsed since the filing of said Frederic B. Jennings' Federal income tax return for the year 1918, and that no warrant of distraint or other proceeding for the collection of said alleged additional taxes was issued or had other than as aforesaid.

XXI. That at the time when the aforesaid warrant of distraint for the alleged additional taxes claimed for the [fol. 41] year 1919 was issued, more than five years had elapsed since the filing of said Frederic B. Jennings' Federal income tax return for the year 1919, and that no warrant of distraint or other proceeding for the collection of said alleged additional taxes was issued or had other than as aforesaid.

Dated March 27, 1928.

Miller & Chevalier, Attorneys for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

The defendant offered in evidence photostatic copy of Individual Income Tax Return for 1918 (with statement attached) filed by Frederic B. Jennings, New York, New York.

Marked Defendant's Exhibit A.

Defendant offered in evidence photostatic copies of Claim for Abatement of $31,108.75 (with copy of letters attached), Income Tax for 1918, filed by Laura H. Jennings, Executrix, Estate of Frederic B. Jennings, New York, New York; Copy of letter, dated January 26, 1924, to estate of Frederic B. Jennings, care of New York Trust Co., from J. G. Bright, Deputy Commissioner; Copy of letter, dated May 23, 1924 to Mrs. Laura H. Jennings, from J. G. Bright, Deputy Commissioner.

Marked Defendant's Exhibit B.

Defendant offered in evidence photostatic copy of Claim for Refund of $35,087.25 (with statement attached), Income Tax and Interest for 1918, filed by Sidney B. Silleck, [fol. 42] Attorney-in-Fact for Laura H. Jennings in her capacity as Executrix of Estate of Frederic B. Jennings, New York, New York.

Marked Defendant's Exhibit C.

Defendant offered in evidence photostatic copy of Copy of letter dated May 14, 1926 to Estate of Frederic B. Jennings, % New York Trust Company, New York, New York from C. R. Nash, Assistant to the Commissioner of Internal Revenue.

Marked Defendant's Exhibit D.

Thereupon counsel for the plaintiff moved that a verdict be directed for the plaintiff and counsel for the defendant moved that a verdict be directed for the defendant.

Thereupon the Court, after due consideration, directed a verdict for the plaintiff to which the defendant duly excepted and the exception was allowed.

Upon the annexed consent, and on motion of Charles H. Tuttle, United States Attorney, attorney for the defendant, I have settled, allowed and signed the foregoing, together with exhibits offered in evidence at the trial, as and for the defendant's bill of exceptions and order that the same be filed.

Dated February —, 1930.

W. I. Grubb, U. S. D. J.

Consented to.

Miller & Chevalier, Attorneys for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

[fol. 43] DEFENDANT'S EXHIBIT "A"

(Here follows exhibit, side folios 43a, 43b, and 43c)

[fol. 44] DEFENDANT'S EXHIBIT "B"

(Here follows exhibit, side folios 44a, 44b, 44c, 44d)

[fol. 45] DEFENDANT'S EXHIBIT "C"

(Here follows exhibit, side folios 45a, 45b, 45c, and 45d)

[fol. 46] DEFENDANT'S EXHIBIT "D"

Received May 11, 1926

IT:PA:PYA. ARN.

May 14, 1926.

Estate of Frederick B. Jennings, c/o New York Trust Company, 100 Broadway, New York, New York.

SIRS: Your claims for the refund of $35,087.25 and $52,471.74, individual income taxes and interest for the years 1918 and 1919, respectively, have ben examined.

The basis of your claims is the statement that the collection of the above sums was barred by the statute of limitations; that the 1919 assessment was illegal; and that interest was illegally collected upon the principal. It is also stated in the 1918 claim that the deduction against gross income for interest paid should be increased.

At the conference held in this office April 20, 1926, it was contended that inasmuch as deficiencies in tax were assessed against a taxpayer who is no longer in existence, the taxpayer having died, the collection of the taxes was barred by Section 250 (d) of the Revenue Act of 1918.

It is disclosed that the deficiencies of $31,108.75 for 1918 and $46,287.04 for 1919 were assessed within the five-year period prescribed by law, and having been assessed within

that period, they could then be collected within six years from the date of the assessments, in accordance with the provisions of Article 1272 of Regulations 65.

The amount of the taxable net income for the year 1918 was determined by an investigation of the taxpayer's books of account and records, the results of which were set forth in the report of the Supervising Internal Revenue Agent at New York, New York, submitted to this office under date of December 18, 1923. The total deduction of $35,122.57, claimed in the return for interest paid, was allowed. No evidence has been submitted in substantiation of the claim that an additional amount of $3,690.12 should be allowed, and accordingly no change has been made in that item.

Your claims in regard to the above items will, therefore, be rejected by this office.

[fol. 46a] You are advised that the matter of the collection of interest, which was added to the amount of the deficiencies at the rate of 1% per month, will be referred to the Collector of Internal Revenue for your district for adjustment.

The rejection of your claims will officially appear on the next schedule to be approved by the Commissioner.

Respectfully, C. R. Nash, Assistant to the Commissioner, by (Signed) A. Lewis, Head of Division.

op- 2.

Rejected. 5329 I. T. Schedule.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

The defendant, Charles W. Anderson, Collector of Internal Revenue, for his assignment of errors respectfully alleges that:

1. The court erred in directing a verdict in favor of the plaintiff for the full amount demanded in the complaint.

2. The court erred in refusing to direct a verdict for the defendant and in refusing to dismiss the complaint in its entirety on the merits.

3. The court erred in holding that the collection of the sum of $31,108.75 was not stayed within the meaning of Section 611 of the Revenue Act of 1928 (U. S. C. A., Title 26, Section 2610).

[fol. 48] 4. The court erred in not holding that the filing of the claim for abatement of $31,108.75 with the Commissioner of Internal Revenue operated to stay the collection of the said tax within the terms of Section 611 of the Revenue Act of 1928.

5. The court erred in holding that Section 611 of the Revenue Act of 1928 does not act retroactively so as to prevent the plaintiff from recovering the sum of $31,108.75 assessed prior to June 2, 1924 and for the abatement of which the plaintiff filed a claim for abatement on or about February 25, 1924.

6. The court erred in holding that the collection of said sum of $31,108.75 and interest by the Collector of Internal Revenue for the Third District of New York was an illegal collection or an overpayment under the provisions of Section 607 of the Revenue Act of 1928 (U. S. C. A., Title 26, Section 2607).

7. The court erred in holding that Section 1106 (a) of the Revenue Act of 1926 operated so as to make the collection of the sum of $31,108.75 by the Collector of Internal Revenue for the Third District of New York on July 22, 1925, illegal.

8. The court erred in holding that the collection of $31,108.75 on July 22, 1925 was barred by the Statute of Limitations.

9. The court erred in holding that Section 611 of the Revenue Act of 1928 (U. S. C. A., Section 2611) is unconstitutional.

[fol. 49] 10. The court erred in holding that the filing of the claim for abatement of the tax by the plaintiff did not operate as a waiver of the five year Statute of Limitation as to the collection of said tax.

11. The court erred in not holding that under Section 611 of the Revenue Act of 1928 the running of the period

of limitation with respect to the collection of the said tax was suspended by the filing of the claim for abatement.

Wherefore Charles W. Anderson, prays this Honorable Court that the errors assigned may be corrected and that the judgment of the District Court of the United States for the Southern District of New York be reversed with costs and that he may have such other and further relief as to this court may seem just.

Dated New York, N. Y., December 23, 1929.

Charles H. Tuttle, United States Attorney, Attorney for Defendant. Office & P. O. Address: U. S. Courts & P. O. Bldg., B'way & Park Row, Borough of Manhattan, City of New York.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Charles W. Anderson, Collector of Internal Revenue, the above named defendant, feeling himself aggrieved by a judgment made and entered herein on October 11, 1929, in the sum of $31,108.75, together with interest and costs, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and prays for an order allowing him to prosecute said appeal and that a transcript of record, papers and proceedings upon which the said order was made, may be duly authenticated and sent to the Circuit Court of [fol. 51] Appeals for the Second Circuit and that a citation be issued, as provided by law.

Dated New York, N. Y., December 23, 1929.

Charles H. Tuttle United States Attorney, Southern District of New York, Attorney for Defendant. Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

It is ordered that the appeal, as above prayed for, be allowed.

Dated New York, N. Y.,

Alfred C. Coxe, U. S. D. J.

[fol. 52] Citation, in usual form, omitted in printing.

[fol. 53] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated February 28, 1930.

Miller & Chevalier, Attorneys for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 55 & 56] In United States Circuit Court of Appeals for the Second Circuit

Laura H. Jennings, as Executrix of the Last Will and Testament of Frederick B. Jennings, Deceased, Appellee,

against

Charles W. Anderson, Individually and as United States Collector of Internal Revenue for the Third District of New York, Appellant

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Appeal by the defendant from a judgment for the plaintiff entered by the District Court for the Southern District

of New York upon a directed verdict in an action at law to recover income taxes paid to a collector under duress.

Leon R. Spencer for the appellant.
Ewing Everett for the appellee.

OPINION

Per CURIAM:

This case presents the same questions as those discussed in the opinion in Reeves v. Anderson, handed down herewith. In accordance with that opinion the judgment herein will be reversed and a new trial ordered.

Judgment reversed; new trial ordered.

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

LAURA H. JENNINGS, as Extx., etc., Plaintiff-Appellee,

v.

CHARLES W. ANDERSON, as Collector, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Filed July 28, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed, with costs and cause remanded for a new trial. Further ordered that execution be issued for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

STIPULATION RE OPINION IN CASE OF REEVES VS. ANDERSON

It is hereby stipulated and agreed by and between the parties hereto and by their respective attorneys that the opinion of the Circuit Court of Appeals for the Second Circuit in the case of Daniel Reeves, Inc., Appellant, against Charles W. Anderson, individually and as Collector of Internal Revenue for the Third District of New York, shall be included as part of the certified copy of the record in this case.

Miller & Chevalier, Attorneys for Appellant. Robert E. Manley, Acting U. S. Attorney, Attorney for Appellee.

[fol. 59] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL REEVES, INC., Appellant

against

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue for the Third District of New York, Appellee

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Appeal by the plaintiff from a judgment of the District Court for the Southern District of New York dismissing a complaint in an action at law to recover income and profits taxes, paid under duress.

Elkan Turk for the appellant.
Walter H. Schulman for the appellee.

OPINION

L. HAND, Circuit Judge:

The taxpayer filed its return for 1919 on March 11, 1920, and during the year paid the taxes disclosed. The com-

missioner assessed a deficiency in March, 1924; the collector made demand for it on April 5, 1924; the taxpayer filed a claim for abatement on the sixteenth of that month. There matters rested without change until September 28, 1925, when the claim was rejected and on November 14, [fol. 60] 1925, the taxpayer paid the deficiency with interest under threat by the collector. After proper preliminary steps this suit was brought against the collector in November, 1927. The question is whether the delay in collecting the tax from March 11, 1920, the date of the return, to November 14, 1925, made the collector's act a tort on which a cause of action arose for money had and received.

In spite of the extraordinary differences in judicial opinion which the situation has evoked—differences which only the Supreme Court can eventually settle—the underlying facts are not complicated. Section 250 (d) of the Revenue Act of 1918 set a limitation of five years after return upon the Commissioner's power to "determine and assess" the amount of the tax. The same section in the Act of 1921 reduced the period to four years, but kept it at five as to assessments under the Act of 1918. Until 1924 the Treasury had no longer period within which to collect taxes through the courts, than to assess them, so that if the Commissioner assessed the tax on the last day of the proper period, he could begin no "suit or proceeding in court" to collect it. He had not in practise paid much attention to this feature of the law because he supposed until February, 1927, that he had power for an indefinite time after assessment to distrain, and this was ordinarily remedy enough. The decision of the Supreme Court in Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, which held that distress was barred [fol. 61] along with "suits and proceedings", disappointed this assurance and there was thereafter no way to collect, once the time to assess had expired. Sections 607 and 611 of the Act of 1928 were passed after this decision; the first made the assessment or payment of any tax after the period of limitation had expired an "overpayment" and gave the taxpayer a "credit or refund" for it, thus leaving matters as they had been, except to repeal section 1106 (a) of the Act of 1926. The second section excepted from the operation of the first all taxes assessed before the Act of 1924 went into effect, upon condition that the taxpayer had filed a claim for abatement which had stayed collection.

The distinction was a fair one. Section 278 (d) of the Act of 1924 had given the Treasury six years after assessment to collect, and while it took until January, 1929, finally to settle it that this applied only to assessments made after June 2, 1924, the effective date of the Act of 1924, (Russell v. U. S., 278 U. S. 181), that had apparently been already divined as a possibility. So it followed that while the Treasury had six years after assessment to collect taxes assessed after June 2, 1924, it had only four or five years from the return as to all assessed theretofore. Although the Commissioner had misconceived the law as to these, Congress made no effect to reclaim them by reimposition; the delay remained a final bar. Only in case the taxpayer had positively caused the Treasury's inaction by demanding a rehearing, was his advantage taken from him. Congress refused to convert indulgence into immunity; certainly nothing could be more reasonable. We have only to determine whether the plan conceived in this spirit has miscarried.

[fol. 62] Specifically the arguments by which this exemption is sought to be secured are first, that collection was not "stayed" by the claim for abatement. If by this is meant that the claim raised no legal bar to collection, the argument is unanswerable; it did not. So far as we can discover no statute before 1924 gave such an effect to a claim for abatement except section 234 (a) (14) of the Act of 1918. This had to be filed with the return and not in response to an assessment, and was limited to inventory losses and rebates. Section 611 certainly did not refer to these. Section 279 of the Act of 1924 did indeed provide for a compulsory stay of collection, but only in the case of jeopardy assessments levied under section 274 (d) of that act. Aside from the limited scope of this section, it did not reach the only assessments touched by section 611, those levied before June 2, 1924. Thus, if we construe "stayed" to mean a legal bar, we should give the section no scope whatever. Patently it must refer to those cases in which the collector did not proceed with enforcement while the Commissioner was engaged in passing upon the claim for abatement; such a stay has in practise been recognized as ancillary to the Commissioner's power to remit, (Title 26, Sec. 149, U. S. Code). Had he insisted upon collection before disposing of the claim, the taxpayer would with some justice have

been vocal in protest. It is ungenerous now to complain that he did not do so.

[fol. 63] Next, the plaintiff says that if "stayed" means a voluntary stay, the record must show that the claim was the cause of it, and does not. The assessment was collectible as soon as made; no effort was in fact made to collect it till the claim was disposed of; the sequence of the two suggests a causal relation between them. Moreover, to suppose that the collector meanwhile withheld action for any other reason than because his collection might turn out to be unwarranted, is to assume that he was slack in his duty; we are entitled to assume the opposite. Article 1032 of Regulations 45 puts collection in his discretion in such circumstances; his inaction would have been without excuse except for the claim. Regardless of the eventual burden of proof on the issue, the presumption is that the delay was caused by the claim; and there was no proof to meet it.

The next point demands more attention. The argument runs as follows. Section 607 provides that a tax assessed or paid after the period had expired should be "credited or refunded". Section 611 is merely an exception from this provision; it does not give any right to the Treasury to hold money which it had no right to hold before. Section 607 was passed to be rid of the effect of Section 1106 (a) of the Act of 1926, which had provided that although the expiration of the period of limitation of a tax extinguished the debt, the Commissioner should not credit or refund it unless it was not in fact due when the taxpayer paid it. This section we held not to prevent an action for money had, (Ellay Co. v. Bowers, 25 Fed. (2) 637); it follows that [fol. 64] at that time the taxpayer could have got a "refund" by action, though he could not from the Commissioner. All that section 607 has done is to restore the administrative remedy which section 1106 (a) took away, leaving the taxpayer in possession of all remedies, except against the Commissioner, (§ 611), in cases where he had induced the delay. Since, however, the remedy of an action at law existed all along, and since it did not therefore need any assistance from section 607, section 611 is irrelevant. It was not intended as an affirmative limitation upon pre-existing remedies.

This argument is not dependent alone upon the word "refund" in section 607; it has a broader historical basis, and it must be confessed that it is plausible. We think it impossible however so to read section 611 for several reasons. Section 3226 of the Revised Statutes as amended in 1926, (Sec. 1113), requires the filing of a claim for refund or credit as a condition precedent to suit against the collector. It certainly would be an unusual thing to require as a condition precedent an application which by hypothesis could not be granted. But even if we assume that Congress might have wished still to impose the abortive claim for abatement as a condition on the action, the consequences are absurd. Nobody has a claim for refund who has not a possible right of action. The time for presenting the claim is three or four years (Title 26, Sec. 1065), and the time within which to sue is five, (R. S. § 3226), so that the time to file the claim expires first. The effect of section 611, [fol. 65] which forbad such claims, would only be that taxpayers should not get that cash from the Commissioner which they still could get by way of judgment. It is difficult to conjure any reason which Congress could have had for forbidding the more commodious way of settling such controversies, and still exposing the Treasury to actions at law which must result in exactly the same thing. It would take the strongest possible language to force us to such a conclusion.

The language of section 607 does not go far enough. It makes the taxes described an "overpayment"; that alone was enough to create a cause of action at law, though it was not necessary, as things stood. The second clause in the sentence changed the situation formerly created by section 1106 (a) of the Act of 1926, the effect of which had been to drive the taxpayer to suit. Section 611 enacted that the excepted assessments and payments should "not be considered as an over-payment", and in so doing positively struck the foundation from under any recovery by action, by credit or by refund; it was more than an exception to the second clause of section 607; it dealt with the merits of the recovery as well as with the remedies available.

This disposes of the only questions that seem to us important, for we cannot so regard the argument against the

validity of the statute, though it is very earnestly presented. Taxpayers in the plaintiff's position do indeed lose an immunity once acquired; they lose it—we will as-
[fol. 66] sume arguendo—by the mere fiat of the statute; Congress has seen fit in effect to impose the tax upon them de novo at a time long after the events took place on which it depends. This is charged to be in violation of the Fifth Amendment, and so it might be, if there had been no original tax, no claim for abatement, no delay of the Treasury in the disposal of that claim, and a consequent loss of all remedies. Were the Fifth Amendment a remorseless pattern which all legislation must fit, the argument might even so be troublesome; might indeed be conclusive. But constitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction. They are not the rules of a game; their meaning is lost when they are treated as though they were. It is quite true that the section took away a defense from the plaintiff; he is right to complain unless we can question the kind of defense it was. The moment we do, it must appear to any fair person that he ought not to have it. What the Treasury lost through its procrastination, it lost forever, even though it was under an honest mistake as to its remedies. If the taxpayer did nothing to provoke or encourage its delay, perhaps it was fair that his liabilities once dead should not be revived; there is a deep instinct behind any statute of limitations. But if he asked for re-
[fol. 67] consideration because he had been unlawfully treated, and if his complaint was entertained, then by virtue of an equally deep instinct, it is unfair to allow him to treat that conduct as a fault which he was the means of procuring. He ought not in short to be able to avoid his share of the public burdens, because the authorities consented to give him a considerate hearing. It does not help to call the bar of the statute a vested right; that is at best a figure of speech, which does now hallow everything that is past, a default in pleading as well as a homestead. One's grip on an antagonist, enmeshed in a net of statutes, may be a vested right, but it is not a constitutional right. The Supreme Court went much further in United States v. Heinszel, 206 U. S. 370, and Rafferty v. Smith, 247 U. S. 226.

Nor does it make any difference that the Senate struck out the House provision for the future collection of such assessments within a year. The argument is that the tax is not uniform under section eight of Article one of the Constitution, and also apparently that it is discriminatory. As to the second, we can see no reason why Congress should not draw the line between what had been closed and what had not. If the Treasury had for four years or more failed to collect, that might be thought time enough even though the taxpayer had been the cause of the delay; there comes a time to end all things. The whole notion of a limitation involves some discrimination, which in actual incidence must appear, and indeed be, arbitrary. As for section eight [fols. 68 & 69] of Article one it has repeatedly been held to require only territorial uniformity, (The Head Money Cases, 112 U. S. 580, 595; La Belle Iron Works v. U. S., 256 U. S. 377, 392.

We have quite deliberately avoided the citation of those decisions which have hitherto dealt with these questions. Those in the district court are so many and so conflicting that it would serve no purpose merely to enumerate them. In the Circuit Courts of Appeal at present the plaintiff would win in the Fifth, (U. S. v. Burden, Smith & Co., 33 Fed. (2) 229), and lose in the Ninth, (Huntley v. Gile & Jenks, 32 Fed. (2) 857; Goodcell v. Graham & Foster, 35 Fed. (2) 586). Apparently he would also lose in the Court of Claims, though we have not been favored with the citation in an available form, (Gotham Can Co. v. U. S.). So far as the courts have gone, there is therefore a preponderance of authority in favor of the decision below.

Judgment affirmed.

[fol. 70] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 71] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response ot such writ.

Endorsed on cover: File No. 35,451. U. S. Circuit Court of Appeals, Second Circuit. Term No. 529. Laura H. Jennings, as executrix of the last will and testament of Frederic B. Jennings, deceased, petitioner, vs. Charles W. Anderson, individually and as United States Collector of Internal Revenue for the Third District of New York. Petition for a writ of certiorari and exhibit thereto. Filed October 27, 1930. File No. 35,451.

FILE COPY

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CHARLES ELMORE C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 529

LAURA H. JENNINGS, as Executrix of the Last Will and Testament of FREDERIC B. JENNINGS, Deceased,

Petitioner,

vs.

CHARLES W. ANDERSON, Individually and as United States Collector of Internal Revenue for the Third District of New York,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

ROBERT N. MILLER
EWING EVERETT
J. ROBERT SHERROD
ARTHUR N. COLTON
Counsel for Petitioner

Of Counsel:
MILLER & CHEVALIER
COTTON & FRANKLIN

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No.

LAURA H. JENNINGS, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased,

Petitioner,

v.

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on July 28, 1930 (R. 55) reversing the judgment of the District Court for the Southern District of New York. The District Court had directed a verdict in favor of the plaintiff in the full amount demanded in the complaint after trial by stipulation with a jury of one.

Questions Involved.

The questions involved in this appeal are whether Section 611 of the Revenue Act of 1928, enacted May 29, 1928, is to be interpreted to deprive the petitioner of the right to recover additional Federal income taxes which were collected from petitioner by respondent under duress and

threat of distraint at a time when collection was barred by the Statute of Limitations then in effect, and suit to recover which was brought before the enactment of that Section, and whether if that Section is so interpreted, it violates the Fifth Amendment to the Constitution of the United States in that it deprives the petitioner of property without due process of law.

Statement.

The facts have been stipulated (R. 35). Respondent concedes that the taxes in question were collected from petitioner by respondent under duress and threat of distraint after the Statue of Limitations applicable thereto (Sec. 250 (d) Revenue Act of 1921) had barred collection; that at the time this suit was instituted, petitioner had a clear right to recover the tax so collected under authority of *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346. Respondent concedes further that unless Sections 607 and 611 of the Revenue Act of 1928 be interpreted retroactively to destroy petitioner's right to recover the tax so collected, petitioner must succeed in this suit.

The original action in the District Court involved the years 1918 and 1919. We are concerned only with the year 1918 since the cause of action involving the year 1919 was dismissed by stipulation (R. 29).

Petitioner is the duly appointed and acting Executrix of the Last Will and Testament of Frederic B. Jennings, deceased, hereinafter referred to as the "decedent".

Decedent duly filed his income tax return for the year 1918 on or before March 15, 1919, paying at that time the taxes due according to the return. Decedent died May 26, 1920.

On February 8, 1924, the Commissioner of Internal Revenue made an assessment of additional taxes against the estate of decedent. On February 25, 1924, petitioner filed a claim in abatement which claim was rejected on August 14, 1924.

On July 1, 1925, respondent issued to a Deputy Collector of Internal Revenue for the Third District of New York, a Warrant of Distraint against the property of the decedent for collection of the said additional taxes and interest.

On July 8, 1925, respondent addressed to decedent's estate a notice and demand for the payment of said additional tax and interest thereon under threat of distraint. On July 30, 1925 (more than five years after the filing of the said return by decedent), petitioner paid said additional tax with interest under protest and solely because of duress and threat of distraint by respondent.

On September 19, 1925, petitioner duly filed with respondent claim for refund of said additional tax and interest on the ground that the collection of said sum was barred by the Statute of Limitations.

On May 13, 1926, the Commissioner rejected the claim for refund as to principal; the interest was subsequently refunded.

This action was begun in the District Court on December 6, 1927 and issue was joined in January, 1928. The Revenue Act of 1928 was enacted and took effect on May 29, 1928.

On October 11, 1929, after trial, by stipulation, with a jury of one, the District Court directed a verdict for the petitioner for the full amount demanded in the complaint. The order of the Circuit Court of Appeals for the Second

Circuit reversing the District Court was entered on July 28, 1930.

The Circuit Court of Appeals did not write an opinion (R. 55) but referred to the Opinion in the case of *Reeves* v. *Anderson* which was argued with this case, and which, by stipulation, is filed herewith as part of the Record (R. 56).

Statutes Involved.

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Sec. 607 relating to payments made after the expiration of the period of limitation on assessment and collection."

Reasons for Granting Writ.

(1) The decision below is squarely in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *U. S.* v. *Burden, Smith & Co.*, 33 Fed. (2d) 229. The cases in the District Courts, to quote Judge LEARNED

HAND in the case of *Reeves* v. *Anderson* "are so many and so conflicting that it would serve no purpose merely to enumerate them" (R. 63). He spoke further of "the extraordinary differences in judicial opinion which the situation has evoked—differences which only the Supreme Court can eventually settle, * * *." (R. 58.)

(2) The case involves an important question which has not been and should be settled by this Court. The Government has argued in this and in other cases involving the same question and now pending before this Court that hundreds of millions of dollars in taxes are involved which will be retained by the Government or returned to the taxpayers in accordance with the ultimate determination of this question.

(3) The decision is in conflict with the decision of this Court in case of *Danzer* v. *Gulf Railway Co.*, 268 U. S. 633, in that it revives a statutory liability after the lapse of the period of limitations set up in the statute which created the liability, and therefore results in the taking of property without due process of law.

(4) Unless the writ is granted herein the rights of this petitioner cannot be preserved pending decisions of this Court as to the meaning and validity of Section 611, in other cases now pending in which this Court has granted writs of certiorari.

The Court has granted a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit in the case of *Graham & Foster* v. *Goodcell* (Reported below 35 Fed. (2d) 586). A Writ was granted by this Court on October 20, 1930 in the case of *Reeves, Inc.* v. *Anderson* (October 10, 1930, No. 463). Both of these cases involved the interpretation of Sections 607 and 611. The judgment below in the *Graham & Foster* case, however, treats almost ex-

clusively the meaning of the word "stay" as used in Section 611 and does not discuss the legislative history of that section or its constitutionality. In the *Graham & Foster* case, moreover, the claim in abatement was rejected within five years after the filing of the return, whereas in this case it was rejected after the five-year period had expired.

It is respectfully urged, therefore, that a decision in the *Graham & Foster* case will not necessarily decide all the questions raised in this case. The petitioner, therefore, requests that this case be advanced to be heard with the *Graham & Foster* and *Reeves* v. *Anderson* cases in order that the ultimate decision of the questions involved may be based on a consideration of the entire scope and meaning of Sections 607 and 611.

WHEREFORE, it is respectfully prayed that this petition for Writ of Certiorari reviewing the judgment of the Circuit Court of Appeals for the Second Circuit in the case numbered on its docket No. 329, *Laura H. Jennings, as Executrix of the Last Will and Testament of Frederic B. Jennings, deceased* v. *Charles W. Anderson, individually and as United States Collector of Internal Revenue for the Third District of New York* be granted; that the said decree be reversed, and that this petitioner have such other and further relief as may be right under the law.

ROBERT N. MILLER
J. ROBERT SHERROD
EWING EVERETT
ARTHUR N. COLTON
Counsel for Petitioner

Of Counsel:
MILLER & CHEVALIER
COTTON & FRANKLIN

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

Neither the decision of the United States Circuit Court of Appeals in this case (R. 55) nor the opinion in *Reeves* v. *Anderson*, on the basis of which the decision was rendered (R. 57), has been officially reported.

Jurisdiction.

The decision of the Circuit Court of Appeals for the Second Circuit sought to be reviewed was entered July 28, 1930 (R. 55). Jurisdiction for the issuance of the writ is found in the provisions of Section 240 (*a*) of the Jurisdictional Code as amended by the Act of February 19, 1925 (43 Stat. 938).

Statement of the Case.

It appears unnecessary to repeat the facts stated in the petition. Respondent concedes that the additional taxes for the year 1918 here in question were collected by respondent from petitioner under duress and threat of distraint after collection had been barred by the statute of limitations, and that when this suit was instituted in the District Court petitioner had a clear and undisputed right to recover a judgment against the respondent under the authority of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346; and that this suit was instituted before the enactment of Section 611, of the 1928 Act, on which respondent relies to defeat it.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In reversing the judgment of the District Court in the case at bar.

(2) In failing to hold that Section 611 of the Revenue Act of 1928 did not apply to the case at bar because it did not appear that the collection of the taxes in question was "stayed" by the claim in abatement.

(3) In holding that said Section 611 was retroactive to the extent of depriving the petitioner of the right to recover a judgment which right clearly existed at the time said section was enacted.

(4) In failing to hold that said Section 611, if construed to deprive petitioner of the right to a judgment which clearly existed at the time the wrong was done by the respondent and at the time this case was instituted in the District Court, deprived petitioner of property without due process of law and is in violation of the Fifth Amendment to the Constitution of the United States.

Argument.

The provisions of the statutes involved herein are set forth in the petition; therefore are not repeated here.

(1) The decision of the Second Circuit in this case conflicts with that of the Fifth Circuit in *United States* v. *Burden, Smith & Company,* 33 Fed. (2d) 229.

The hopeless conflict in the District Court cases induced Judge LEARNED HAND to say in *Reeves* v. *Anderson* (R. 63):

> "We have quite deliberately avoided the citation of those decisions which have heretofore dealt with these questions. Those in the District Court are so many and so conflicting that it would serve no purpose merely to enumerate them."

(2) The question at issue is an important one. The respondent stated in his brief below that on this question depend "refunds running into millions" and similar statements have been made by the Government in other cases.

(3) The application by the court below of Section 611 to the instant case was erroneous, first, because there was no "stay" either before or after the rejection of the abatement claim, but rather a mere voluntary delay on the part of the Commissioner in making collection. In using the word "stay" Congress contemplated some act on the part of the taxpayer which would legally or morally tie the hands of the Collector. *United States* v. *Burden, Smith & Company, supra.* No such stay occurred in this case; the Collector merely failed to collect.

The Treasury Regulations are clear on the subject:

> " * * * The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund" (Article 1032, Regulations 45).

The decision of the Court below was erroneous also because even if the Collector's inaction may be regarded as a "stay", there is no evidence in the record that such stay was caused "by the claim in abatement".

The heading of Section 611, "Collection Stayed *by* Claim in Abatement", confirms the common sense conclusion that the section was meant to apply only when the claim in abatement was the active cause of the failure to collect in time.

In the case at bar the claim in abatement was rejected on August 14, 1924, and the tax was not collected until July 30, 1925.

(4) Section 611 is but a subsidiary of Section 607 of the Revenue Act of 1928 and both relate solely to administrative refunds and credits and have nothing to do with recoveries in court. Section 607 was enacted to authorize certain administrative refunds or credits which had previously been forbidden by Section 1106 (*a*) of the Revenue Act of 1926.

Section 607 provides for "credits" and "refunds". The making of credits and refunds is an administrative function of the Commissioner of Internal Revenue, and has been authorized by each succeeding revenue act since the Revenue Act of 1916 in cases of *overpayments of taxes*: Section 14 (*a*) Revenue Act of 1916, 39 Stat. 773. Section 252, Revenue Act of 1918, 40 Stat. 1057. Section 252, Revenue Act of 1921, 42 Stat. 227. Section 281, Revenue Act of 1924, 43 Stat. 339. Section 284, Revenue Act of 1926, 44 Stat. 9. Section 322, Revenue Act of 1928, 45 Stat. 791.

These Sections have been held to have nothing to do with recoveries in the courts, but to relate solely to administrative credits or refunds by the Commissioner of Internal Revenue. *Fox* v. *Edwards*, 287 Fed. 669. *Coffey* v. *Exchange Bank*, 296 Fed. 807.

Section 1106 (*a*) of the Revenue Act of 1926 after providing that the bar of the statute of limitations should not only operate to bar the remedy but also extinguish the liability, provided "but no such credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." In the case of *Ellay Company* v. *Bowers*, 25 Fed. (2d) 637 (decided by Second Circuit) it was held that this prohibition against credits and refunds applied

to the Commissioner of Internal Revenue only and did not constitute a bar to actions against Collectors. In substituting Sections 607 and 611 for Section 1106 (*a*), Congress did not intend to affect in any way the right to proceed in the Courts.

(5) Sections 607 and 611 do not purport to apply to cases arising prior to the enactment of the Revenue Act of 1928 and may not be given retroactive effect. It will be noted by reference to the sections that their terms are entirely prospective. Section 607 provides that taxes which have been illegally collected after the period of limitations "shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim". Moreover, the section does not bear after its heading the word "Retroactive"—a practice followed in the statute where retroactive effect was intended. (Compare Sections 702 to 706 inclusive of the Revenue Act of 1928.) Where retroactive effect was not clearly intended, such a construction should be avoided. *United States* v. *Magnolia Petroleum Company*, 276 U. S. 160.

(6) If retroactive, Section 611 was intended to apply only to voluntary payments. The Commissioner has recognized that only such payments as are voluntarily made after the effective date of the Revenue Act of 1928, in cases where collections were stayed by abatement claims, come within the provisions of Section 611. See Instructions to Collectors, Mim. 3660, Cumulative Bulletin VII-2, p. 82 (Prentice-Hall (1930), page 19,344), where it is directed:

"COLLECTION NOT TO BE ENFORCED.

"(1) Sections 607 and 611 do not authorize the Bureau to enforce collection of a tax in any case after

the expiration of the period of limitations but merely prescribe the effect of the period of limitations against the United States upon any assessment or payment made after the expiration of the period of limitations applicable thereto. Therefore, no attempt will be made to enforce collection of any outstanding assessment if the period of limitation within which collection can be made has expired, or to make any assessment of any tax if the period of limitation within which the assessment can be made has expired, or to enforce collection of any tax if the assessment was not made within the period of limitation prescribed for the making of the assessment and if no suit for collection without assessment was begun prior to the expiration of such period."

If this distinction between voluntary and involuntary payments is reasonable for the period after the enactment of the 1928 Act, it seems a reasonable distinction before, if that Act is to be given retroactive effect.

(7) If Section 611 was intended to bar actions in the courts it is void as an attempt to take property without due process of law.

(*a*) THE PROTECTION AFFORDED CITIZENS BY THE FIFTH AMENDMENT TO THE CONSTITUTION, AGAINST FEDERAL STATUTES WHICH HAVE THE EFFECT OF TAKING PROPERTY WITHOUT DUE PROCESS OF LAW, INCLUDES PROTECTION AGAINST STATUTES WHICH RE-CREATE, OR REVIVE, LIABILITIES WHICH HAVE BECOME EXTINGUISHED THROUGH LAPSE OF TIME. *Danzer* v. *Gulf and Ship Island R. R. Co.*, 268 U. S. 633, 636. *Davis* v. *Mills*, 194 U. S. 451. *The Harrisburg*, 119 U. S. 199.

In these cases this Court distinguished the earlier case of *Campbell* v. *Holt*, 115 U. S. 620 (to the effect that limitations of the time for asserting common law liabilities might legally be changed or taken away altogether), saying that in *Campbell* v. *Holt* (involving a breach of com-

mon law liability on a contract) the limitation provisions applied "to the remedy only", but pointed out that other types of limitation "operate as a limitation upon *liability.*" The Court cited many cases in which liabilities were created by statute and limitations contained in the same or later statutes were held to bar not only the remedy but the liability itself. In the latter type of limitation, it is held that Congress lacks the power to revive the limitation, and thus revive the liability.

(*b*) THE PROPOSITION THAT THE RUNNING OF THE STATUTE EXTINGUISHED THE LIABILITY FOR THE TAX HAS FORMED A NECESSARY BASIS FOR ALL DECISIONS SUSTAINING THE RIGHT OF CITIZENS TO SUE COLLECTORS OF INTERNAL REVENUE, AND RECOVER SUMS ILLEGALLY EXACTED AS TAXES, AFTER THE STATUTORY PERIODS FOR COLLECTION HAD RUN.

There are no statutes which specifically authorize suits against collectors in cases of this kind. Such actions are brought as common law actions in assumpsit, for moneys had and received, and are personal to the collector, and not against his office. *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1; *Levy* v. *Wardell*, 258 U. S. 542.

Such actions retain their common law basis, notwithstanding the statutory provisions for proceedings before the Commissioner of Internal Revenue required as conditions precedent to suit (Sections 3226 and 3228, Revised Statutes), and those statutes which provide for the conversion of a judgment against a collector to one against the United States, and its repayment. Sections 989 and 3220, Revised Statutes; *Patton* v. *Brady*, 184 U. S. 608; *Sage* v. *United States*, 250 U. S. 33.

The Courts which have construed Section 611 as operating merely to withdraw the *defense* of the statute of

limitations, upon authority of the decision in *Campbell* v. *Holt, supra,* have wholly failed to show how a mere matter of defense can form the basis for an affirmative action in assumpsit. It seems to have been assumed in those cases that actions against collectors in such cases are in themselves founded upon the limitations provisions of the revenue laws. Such is not the case, as these limitations refer solely to the administrative matter of collecting taxes and make no provisions for suits for recoveries of sums collected in violation of such provisions.

(*c*) SECTION 611 WAS NOT INTENDED AS A RATIFICATION OF ILLEGAL COLLECTIONS OF TAXES MADE AFTER THE STATUTORY PERIOD THEREFOR.

This Court has sustained the power of Congress to ratify illegal acts of collectors of public revenues, and to do so even though suits for the recoveries of moneys so illegally collected were pending at the time the ratifying statutes were passed. *United States* v. *Heinszen,* 206 U. S. 370. *Rafferty* v. *Smith, Bell and Company,* 257 U. S. 226.

In these cases, however, there were involved statutes which expressly ratified the illegal collections and were susceptible of no other meaning. In the *Heinszen* case this Court pointed out that, while Congress could ratify illegal collections, "it is not to be presumed to do so on language which, literally taken, has a narrower sense" citing its decisions against implied ratifications in *Lincoln* v. *United States,* 197 U. S. 419 and *De Lima* v. *Bidwell,* 182 U. S. 1.

The power to revive a tax, like the power to ratify, may be exercised only if the rights of private parties have not intervened. *Stockdale* v. *Life Insurance Com-*

pany, 87 U. S. (20 Wall.) 323. But, as has been recognized by this Court, citizens who have suffered wrongful exactions of money by collectors of internal revenue, acting without the scope of their office, do have rights enforcible against said collectors, as individuals. This bars a revival of the tax since such rights of action are property within the meaning of the Fourteenth and Fifth Amendments to the Constitution.

(*d*) IF INTENDED AS A RATIFICATION OF ILLEGAL COLLECTIONS IN CASES WHERE COLLECTION WAS STAYED BY CLAIMS IN ABATEMENT, SECTION 611 OPERATES IN SUCH AN ARBITRARY AND DISCRIMINATORY MANNER AS TO CONSTITUTE CONFISCATION OF PRIVATE PROPERTY.

If Section 611 be a ratification or revival of barred taxes, it is valid or invalid by the same tests which are applied to taxes when laid in the first instance. It is well settled that Congress for all its broad powers to lay taxes must act in that respect so as to produce results conformable to the purposes of taxation, and its enactments which go beyond this and are so arbitrary and discriminatory as to amount to confiscation will not be sustained. *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1; *Nichols* v. *Coolidge*, 274 U. S. 531; *Blodgett* v. *Holden*, 275 U. S. 142.

(1) Section 611 does not authorize the retention of moneys illegally collected where collection was stayed by claims for credit (G. C. M. 6296-Cumulative Bulletin VIII-35-4326).

(2) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the

Revenue Act of 1928. (I. T. 3660—Cumulative Bulletin VII—2, p. 82.)

(3) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(4) Section 611 does not authorize collection to be made from those who stayed collection by claims in abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period therefor.

Section 611 applies only to moneys wrongfully gotten and in the possession of collectors or the Treasury, when the Revenue Act of 1928 was passed, or sums voluntarily paid within one year thereafter, thereby disclosing the true purpose of the Section (as construed by the court below) to be to *confiscate* that which is at hand, not to acquire by taxation that which was formerly due, but which, due to the Government's own mistake of law was not collected in time.

Respectfully submitted,

ROBERT N. MILLER
J. ROBERT SHERROD
EWING EVERETT
ARTHUR N. COLTON
Counsel for Petitioner

Of Counsel:
MILLER & CHEVALIER
COTTON & FRANKLIN

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CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 529.

Laura H. Jennings, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased,

Petitioner,

vs.

Charles W. Anderson, Individually and as United States Collector of Internal Revenue for the Third District of New York,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

Ewing Everett
Robert N. Miller
J. Robert [illegible]
Arthur N. [illegible]
Attorneys for Petitioner.

Miller & Chevalier
Cotton & Franklin
Of Counsel.

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IN THE

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OCTOBER TERM, 1930.

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LAURA H. JENNINGS, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased,

Petitioner,

vs.

CHARLES W. ANDERSON, Individually and as United States Collector of Internal Revenue for the Third District of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The District Court for the Southern District of New York, without an opinion, directed a verdict in favor of the petitioner as plaintiff below (R. 15, 16). The case has not been reported officially.

The opinion *per curiam* (R. 28) of the Second Circuit (handed down July 21, 1930, but not yet officially reported) reversed the District Court and stated that the present

case "presents the same questions as those discussed in the opinion in *Reeves* v. *Anderson*, handed down herewith". The opinion in the *Reeves* case appears as a part of the record herein (R. 29-35). A Writ of Certiorari in that case (Oct. Term 1930, No. 463) has been granted and it has been advanced for argument herewith.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 28, 1930 (R. 28). Petition for Certiorari was filed October 27, 1930 (R. 36), and granted November 24, 1930 (R. 35). Jurisdiction is conferred upon this court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Involved.

The case involves the following questions:

(1) Is Section 611 of the Revenue Act of 1928 limited in its application to voluntary payments made by the taxpayer "before or within one year after the enactment" of the Act, or may it be extended with retroactive effect to legalize enforced collections made before the passage of the Law?

(2) Does Section 611, like Section 607 to which it is but an exception, relate merely to administrative refunds and credits of taxes in ordinary course under the provisions covering such administrative acts, or was it also intended to furnish a defense to suits against collectors?

(3) Do the facts in the present case support respondent's contention that the collection of the Federal income taxes in question was "stayed" by a claim in abatement within the meaning of Section 611?

(4) If Section 611 was intended to bar recoveries by suit in court in cases similar to the one at bar, does the Section violate the Fifth Amendment of the Constitution?

Statutes Involved.

Sections 607, 611 and 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, provide:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax), assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Sec. 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 612. REPEAL OF SECTION 1106 (*a*) OF 1926 ACT. Section 1106 (*a*) of the Revenue Act of 1926 is repealed as of February 26, 1926."

Statement.

This case was tried before the District Court on a stipulation of facts (R. 18-21), together with Exhibits A to D,

inclusive, introduced by the respondent (defendant below) at the trial (R. 22, 23). The original action in the District Court was based on claims for refund of Federal income taxes for the years 1918 and 1919. Only the year 1918 is now involved, the cause of action involving the year 1919 having been dismissed by stipulation (R. 14).

The respondent concedes that at the time of the enforced collection of the taxes in question, on July 30, 1925, the five-year statute of limitations applicable thereto had expired and that but for the provisions of Section 611 of the Revenue Act of 1928, petitioner would be entitled to recover in this action. *Bowers* v. *New York and Albany Lighterage Company*, 273 U. S. 346, 47 S. Ct. 389. The issue is therefore confined to the interpretation of Section 611.

The pertinent facts in the case are as follows: Petitioner is the Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased (R. 18).

Decedent duly filed his income tax return for the year 1918 on or before March 15, 1919, paying at that time the taxes due according to the return. Decedent died May 26, 1920 (R. 18).

On February 8, 1924, the Commissioner of Internal Revenue made an assessment of additional taxes against the estate of decedent (R. 18).

On February 25, 1924, petitioner filed a claim in abatement which claim was rejected on August 14, 1924. The reason given in the claim in abatement as the basis thereof was the erroneous inclusion of certain items in decedent's net income (R. 19, 22—Def. Ex. "B").

On July 1, 1925, respondent issued a Warrant of Distraint against the property of the decedent for collection of the said additional taxes and interest (R. 19).

On July 30, 1925 (more than five years after filing of

the said return by decedent and eleven and one-half months after the rejection of the claim in abatement) the respondent, notwithstanding petitioner's protests, enforced collection of the said additional tax and interest by duress and threat of distraint (R. 19).

On September 19, 1925, petitioner duly filed with respondent claim for refund of said additional tax and interest on the ground that the collection of said sum was barred by the Statute of Limitations (R. 19, 20).

On May 13, 1926, the claim for refund was rejected as to principal; the interest was subsequently refunded (R. 19).

This action was begun in the District Court on December 6, 1927 (R. 1).

The Revenue Act of 1928 was enacted and took effect on May 29, 1928.

On September 27, 1929, after trial, by stipulation, with a jury of one, the District Court directed a verdict in favor of the petitioner (R. 15). Judgment of the District Court was entered October 11, 1929 (R. 16). The judgment of the Circuit Court of Appeals for the Second Circuit reversing the District Court was entered on July 28, 1930 (R. 28).

Specification of Errors to be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that Section 611 is to be applied to legalize collections effected by duress prior to the passage of the Revenue Act of 1928, and in not holding that the Section relates only to future administrative action on voluntary tax payments made before or within one year after the passage of the Law.

(2) In holding that Section 611 applies not only to purely administrative credits and refunds of the type mentioned in Section 607, but that it was also intended to furnish a defense in suits at law against Collectors.

(3) In holding that Section 611 of the Revenue Act of 1928 applies to the facts in this case, notwithstanding the absence of any proof that the claim in abatement was influential in staying the Collector from enforcing collection.

(4) In holding that Section 611 should be construed to revive a tax liability expressly discharged by law (in addition to being merely barred) and that, so interpreted, it does not violate the Fifth Amendment to the Constitution.

(5) In reversing the judgment of the District Court for the Southern District of New York.

Outline of Argument.

The respondent concedes that at the time of the enforced collection of the taxes in question, the statute of limitations applicable thereto had expired, *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346, 47 S. Ct. 389, and that but for the provisions of Section 611 of the Revenue Act of 1928 the petitioner would have been entitled to recover in this action.

The general policy of protecting taxpayers from stale demands has been reflected in a long series of Revenue Acts, including the Revenue Act of 1928. Section 611 of the Revenue Act of 1928 created a limited exception to that policy. Said Section should not be interpreted to apply to the present case and to validate the prior illegal act of the Collector who violated the law in making a forcible collec-

tion where the taxpayer had done nothing but file a claim in abatement upon the invitation of the Government itself.

There are two general classes of payments of barred tax—those where on the demand of the Collector the taxpayer makes a voluntary payment and those where he pays only when forced to do so. Section 611 applies the same language to payments made before and after its enactment. The legislative history of the Section clearly shows that it does not validate or in any way apply to a payment which was enforced subsequent to its enactment. Since the Section uses the same language with respect to payments made before and after its enactment, it therefore follows that the Section does not apply to enforced payments made before its enactment.

The Section is also limited to administrative credits and refunds and was not intended to furnish a defense in suits at law against collectors. The making of credits and refunds is a purely administrative function of the Commissioner authorized by certain sections of each Act since the Revenue Act of 1916. Such Sections, however, were limited to cases where there were "overpayments" of taxes.

In an entirely different category were taxes illegally collected after the statutory period but not overpaid in the sense of never having been due. Refunds in such cases were authorized by Section 3220 of the Revised Statutes.

Section 607 of the 1928 Act to which Section 611 is but an exception was enacted to take the place of Section 1106 (a) of the Revenue Act of 1926. Section 1106 (a) of the 1926 Act which provided that the running of the statute of limitations should operate not only to bar the remedy but to extinguish liability, further provided "no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax". The prohibition on

claims and refunds in Section 1106 (a) has been interpreted as being limited to the administrative action of the Commissioner and did not apply to suits by the taxpayer. *Ellay* v. *Bowers*, 25 Fed. (2d) 637, Certiorari Denied, 48 S. Ct. 601.

In drafting Section 611 of the 1928 Act, Congress used the word "stayed" advisedly and in a sense different from "delayed". There were situations in which a stay in its legal sense would have resulted from the filing of a claim in abatement either with or without bond. The facts in the present case, however, indicate that there was no legal or moral obligation placed upon the Collector to refrain from collecting the tax.

Further, even assuming that the word "stayed" should be construed as "delayed", the facts in the present case show that the filing of the claim did not cause the Collector to delay in collecting the tax. The claim in abatement was filed on February 25, 1924, was rejected on August 14, 1924 and it was not until more than eleven and one-half months after the rejection of the claim that the tax was forcibly collected. The burden of proof was upon the respondent to show below that the filing of the claim in abatement had delayed collection. It was peculiarly within respondent's knowledge as to whether any acts took place in connection with the claim in abatement which caused the delay in collection. While respondent had full opportunity to introduce such facts in evidence he failed to do so and the record shows that there was merely a filing of a claim in abatement and a delay of more than eleven and one-half months in collection after its rejection.

If Section 611 was intended to bar actions in the courts, it is void as an attempt to take property without due process of law. Section 1106 (a) of the Revenue Act of 1926

was merely declaratory of the pre-existing law that the running of the statute of limitations extinguished the taxpayer's liability for the tax. Section 611, therefore, can only operate to impose for the first time a retroactive tax. While Congress may levy taxes retroactively, it may not levy such taxes upon a small group of citizens selected with no reasonable basis. If the Section is to be applied retroactively, it would levy for the first time a tax upon a small group of citizens who at the invitation of the Government had filed claims in abatement without imposing a similar liability upon other citizens whose taxes were delayed in collection due to the filing of waivers, claims for credit or because of innumerable other grounds. "A classification for the purposes of taxation must rest upon some reasonable distinction." *Schlesinger* v. *Wisconsin*, 270 U. S. 230. The selection of a group of taxpayers who had done nothing more than file claims in abatement would result in an arbitrary and unreasonable classification and would contravene the Fifth Amendment to the Constitution.

It is submitted that Section 611 does not apply as a defense to the case at bar and the judgment of the Circuit Court should be reversed.

ARGUMENT.

POINT I.

While Section 611 relates to payments "made before or within one year after the enactment" of the Act, it is limited to payments made voluntarily by the taxpayer and does not apply to legalize enforced collections effected either before or after the Law.

The general policy of protecting taxpayers from stale demands has been reflected in a long series of Revenue Acts, including the Revenue Act of 1928. Section 611 of the Revenue Act of 1928 created an exception to that policy. The effect of the Government's argument is that the exception goes even to the extent of providing that in cases where a collector had defied the limitations set on his conduct by law and had made collection by force from a taxpayer who insisted on his right to be free from such collection, the taxpayer was to be without any redress, provided he was one of those taxpayers who, in presenting his views to the Government, had chosen to file a certain kind of claim, which, at the time, he had full right to file. In other words, the Government claims that Congress intended to validate the action of the collector who violated the law in making a forcible collection, in cases where the taxpayer had done nothing but file a claim in abatement, a type of claim which was not only legal but was invited by the Government's own regulations. We submit that the words of the section do not indicate such an extreme intention.

There are two general classes of payments of barred tax—those where, on the demand of the collector, the taxpayer makes voluntary payment of the barred tax and those where he pays only when forced to do so. As will be

shown hereafter by legislative history and Bureau practice, as regards payments after the Act, the section takes away certain rights of the taxpayer if payment was voluntary, but not if the payment was an enforced one.

Therefore, it is our contention that since the same language in the section applies to payments before and after its enactment, the section has no application to enforced payments either before or after its enactment, but only to the voluntary payments so made. The Court below, however, held that in this case Section 611 applies, although payment was enforced.

Section 611, by its specific terms, relates to payments made *before* or within one year *after* the enactment of the law. The language used clearly indicates that payments falling into either classification shall be treated in precisely the same manner. Such payments, irrespective of whether they took place before or within one year after the law "shall not be considered as an overpayment under the provisions of 607".

As will be shown hereafter, the Section does not in any way authorize or validate a collection enforced *after* the enactment of the Law.

The basis of the foregoing contention as to payments after the section was enacted is as follows: Section 611 as originally introduced in the House Bill, December 6, 1927, not only placed a prohibition on refunds but authorized collection by distraint or suit if begun not later than a year after the law became effective. It read as follows:

> "SECTION 611. *Collection Stayed by Claim in Abatement.* If any Internal Revenue Tax (or any interest, penalty, additional amount or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if

a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then—

(a) the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection; and

(b) *a distraint or proceeding in court for the collection of such part may be begun within one year after the enactment of this Act.*" (H. R. 1, page 213, 70th Congress, 1st Session.) (Italics ours.)

The Finance Committee of the Senate struck out the entire section, Senator Smoot, Chairman, saying:

"Your Committee believes that the bar of the statute should be made effective as to both Government and the taxpayer and recommends that this section be eliminated." (Senate Report No. 960, page 42, 70th Congress, First Session.)

The Senate passed the Bill with Section 611 eliminated. It then went to conference and the Section was reincorporated in the Act, but the provision which authorized that "a distraint or proceeding in court for the collection of such part may be begun within one year after the enactment of this Act" was eliminated.

It is clear from the foregoing *résumé* of the history of the Bill that it was not intended to authorize the enforced collection of barred taxes subsequent to the enactment of the Revenue Act of 1928, even though a claim in abatement may have been filed and the filing of such claim may have

stayed collection. The Treasury Department has properly adopted this view in G. C. M. 4197, Internal Revenue Cumulative Bulletin VII-2, 87, where the General Counsel, referring to Section 611, stated as follows:

> "In order that proper action may now be taken in such cases, it is deemed advisable to render an opinion as to what extent, if any, the disposition of such cases is affected by the Revenue Act of 1928. * * * This Section of the Revenue Act of 1928 clearly has reference only to refund of taxes paid after the running of the statute of limitations where a claim in abatement has been filed, and as clearly it does not authorize the enforced collection of tax simply because a claim in abatement has been filed."

The present policy of the Treasury Department with respect to enforcing collections *after* the passage of the Act as further explained in Mimeograph 3660, Internal Revenue Cumulative Bulletin VII-2, p. 82. The Commissioner after stating that "Sections 607 and 611 *do not authorize* the Bureau to *enforce collection* of a tax *in any case after the expiration of the period of limitation,* but merely prescribe the effect of the period of limitation against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto", directs that "inasmuch as many taxpayers will undoubtedly continue the practice heretofore followed of paying the amounts determined to be due notwithstanding the running of the statute of limitations, taxpayers offering to pay should be advised of their rights under the law and requested to execute waivers or enter into closing agreements." (Italics ours.)

To hold that a forced collection subsequent to May 29, 1928, is legalized by Section 611 would be to disregard the fact that the original House Bill specifically contained a provision which *would have* legalized such collection, but which after careful discussion and consideration on the part of both House and Senate was intentionally eliminated. There is no word or phrase in the statute, as it now reads, which would give justification to an interpretation which would authorize or validate a subsequent enforced collection.

If the word "payment" is interpreted as meaning "enforced collection" and if we accept, as we must, the conclusion that collections enforced subsequent to the passage of the Law are not affected in any manner by Section 611, we can hold that it does affect prior enforced collections only by saying that the Section provides exactly that which it does not, *i. e.*, that payments made before and after the enactment of the Law shall be placed in separate categories and that the Section does apply to prior payments but does not apply to subsequent payments. We cannot do this because we find that the language applies with like effect to situations arising before and after the enactment of the Law.

As has been indicated above, the Department has adopted the practice in cases arising after the passage of the Act of advising taxpayers of their rights and permitting them to make voluntary payments if they wish to do so. Having once made a voluntary payment, then the proper interpretation of Section 611 would prevent the Commissioner from making a refund thereof merely because the Statute of Limitations had run at the time when the payment was made. It was equitable and just that the

provisions should apply with similar effect to voluntary payments made prior to the passage of the Act, even though the Statute of Limitations may have run at the time when such payments were made. By limiting the Section, therefore, to voluntary payments, we find that its terms may be consistently complied with both as to prior and subsequent payments and its purposes carried out.

Much has been said in the various decisions of the lower courts with respect to the intention to be gathered from the legislative history of the Section. *It should be noted, however, that most of the statements referred to in those cases which hold in favor of the Government relate to comments or explanations made at a time when the bill included specific authorization for collection after the statute.*

The explanation of the Section given after the authorization for subsequent collection had been eliminated, is contained in the Report of the Managers for the House, wherein the following statement is made with respect to the elimination of the authorization for collection:

> "The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition on refunds, as above described, and eliminating the authority for collection." (Statement of Managers for the House, page 23, Rep. No. 1882, 70th Congress, 1st Session.)

It is submitted that in its present form, as stated by the House manager, the Bill has the effect of "retaining the prohibition on refunds, as above described, and eliminating the authority for collection". This applies with equal effect to enforced collections made both subsequent and prior to the enactment of the Law.

POINT II.

Section 611 applies only to administrative credits and refunds and was not intended to furnish a defense in suits at law against Collectors.

As has been noted, Section 611 considered by itself has no meaning whatsoever. It merely declares what "shall not be considered an overpayment under Section 607". Section 607 provides that any tax assessed or paid after the expiration of the period of limitations properly applicable thereto "shall be considered an overpayment and shall be credited or refunded to the taxpayer" if claim therefor is duly filed. The making of credits and refunds is a purely administrative function of the Commissioner of Internal Revenue which has been authorized by each succeeding revenue law since the Revenue Act of 1916, but the sections authorizing such credits or refunds were limited to cases in which there were "overpayments" of taxes. (Act of 1916, Section 14 (a); 39 Stat. 773; Act of 1918, Section 252; 40 Stat. 1057; Act of 1921, Section 252; 42 Stat. 227; Act of 1924, Section 287; 43 Stat. 339; Act of 1926, Section 284; 44 Stat. 9.) These sections have been held to apply solely to administrative functions of the Commissioner. *Fox* v. *Edwards,* 287 Fed. 669, *Coffey* v. *Exchange Bank,* 296 Fed. 807.

In an entirely different category were taxes illegally collected after the statutory period therefor, but not overpaid in the sense of never having been due. In such cases Section 3220 of the Revised Statutes and the amendments thereto allowed the Commissioner to refund taxes "erroneously or illegally assessed or collected * * * taxes * * * in any manner wrongfully collected."

In 1923 the effect of the statute of limitations and the manner in which it affected the taxpayer's rights was brought before this Court in the case of *Graham* v. *duPont*, 262 U. S. 234, 258, in which case a taxpayer attempted to enjoin the collection of taxes which had been barred by the statute of limitations. It was held that no injunction would lie, but the Court stated:

> "It is certain that by the amendments to Section 252 and Section 3226, Revised Statutes, by the Act of March 4, 1923, c. 276, 42 Stat. 1504, the complainant is given the right now to pay the tax, and sue to recover it back, and in such a suit to raise * * * the bar of time against the assessment which he attempted to raise in the bill."

In spite of this dictum, the United States Court of Claims in December, 1925, in the case of *Toxaway Mills* v. *United States*, 61 Ct. Cls. 363, held that the proposition that a taxpayer might sue in court for the recovery of taxes collected after the statute of limitations could not be sustained "unless it be held that the limitation prescribed by the Act of 1921 operated not alone upon the remedy but also upon the right of the Government to collect and hold additional taxes after the end of the statutory limitation, even though such additional taxes were proper liabilities of plaintiff before that time." The Court held that the statute of limitations operated as a bar to the remedy but did not extinguish the right of the Government to collect the taxes and that the taxpayer was not entitled to a refund of the taxes which had been collected after the running of the statute of limitations. This decision of the Court of Claims resulted in the incorporation in the Revenue Act of 1926, 40 Stat. 9, of Section 1106, Subdivision (a), which provided:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

The purpose of this enactment was declared in Conference Report on the Revenue Bill of 1926 (House Report No. 356, p. 55, 69th Congress, First Session) to be as follows:

> "Amendment No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (Toxaway Mills *v.* U. S.), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court (See, TAFT, *C. J.*, in Graham *v.* duPont, 262 U. S. 234, 256, 258)."

Congress thus recognized that Section 1106 (a) was but declaratory of the existing law. In January, 1927 this Court held in the case of *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, that a taxpayer from whom taxes have been collected after the expiration of the statute of limitations might recover in an action at law against a Collector, without requiring proof that the taxpayer had overpaid the tax in question. This decision caused the Solicitor General to confess error in the *Tox-*

away Mills case, *supra,* in which a writ of certiorari had been granted.

As has been noted above, Section 1106 (a) of the 1926 Act, while stating that the bar of the statute operated to extinguish liability, further provided "but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." Some taxpayers were afraid that this provision would be construed (as has been Section 611 in the instant case by the Court below) as precluding a suit for recovery of taxes collected after the statutory period unless there had been an overpayment in the first instance. They, therefore, sought to establish that the prohibition against the enjoining of collection of Federal taxes contained in Section 3224, Revised Statutes, did not apply. The resulting suits clearly held that while Section 1106 (a) prohibited credits and refunds by the Commissioner of Internal Revenue, it had nothing to do with suits in the courts. *Ellay* v. *Bowers,* 25 Fed. (2d) 637, certiorari denied 48 S. Ct. 601. The Solicitor General in the case of *Adelaide F. Chapman* v. *United States,* 63 Ct. Cls. 424, acquiesced in this interpretation of 1106 (a) as follows:

> "Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in Graham *v.* duPont, *supra,* or prevent distraint proceedings by injunction and may be compelled by the collector to pay a tax the collection of which is barred by the statute of limitations, and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

Thereafter this Court, upon the motion of the Solicitor General, reversed the Court of Claims in the case of *Chapman* v. *United States, supra,* remanding the case with instructions to enter judgment for the taxpayer (278 U. S. 660).

At this stage was enacted the Revenue Act of 1928 which differed from preceding revenue laws in that it merely supplemented the Revenue Act of 1926, leaving operative all provisions of the earlier law, not specifically repealed or modified. Section 612 of the Act of 1928 provided that Section 1106 (a) of the prior Act was repealed as of February 26, 1926.

It is clear from what had theretofore transpired that Section 607, in declaring that payments of taxes after the statutory period therefor "shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim" was merely authorizing what Section 1106 (*a*) forbade, *i. e.,* administrative credits or refunds by the Commissioner where barred collections had been made, even though there was no true "overpayment" involved. This was the sole purpose of Section 607, which, like the Sections which preceded it relating to credits or refunds, had nothing to do with rights of action in the courts.

Section 611, which merely declares what "shall *not* be considered an overpayment under Section 607" was intended only to preserve (in the cases where collections had been stayed by abatement claims) the prohibition against administrative refunds, where the taxpayer had not overpaid the tax, which was formerly contained in Section 1106 (*a*) of the 1926 Act but was removed by Section 607, and, like Section 1106 (a), was not intended to have any effect upon rights of taxpayers to sue and recover in the courts.

It is submitted that the history of the legislation and decisions preceding the enactment of Section 611, clearly establishes: (1) that Section 611 is limited in its application to administrative refunds by the Commissioner, and (2) that Section 1106 (*a*) of the 1926 Act was merely declaratory of the pre-existing rule of law that the running of the Statute of Limitations in cases similar to the one at bar had the effect of extinguishing liability. This latter point becomes material when we come to consider the constitutionality of Section 611.

POINT III.

In drafting Section 611 of the 1928 Act, Congress used the word "stayed" advisedly and in a sense different from "delayed"; further, even though the word "stayed" be construed as meaning "delayed", the facts in the present case show that the claim in abatement did not cause the Collector to refrain from enforcing collection of the taxes in question.

In briefs already filed with this Court in other cases involving similar issues, convincing reasons have been set forth to show that the word "stayed" is not synonymous with the word "delayed," and that before Section 611 can apply it must be shown that the filing of the claim in abatement placed a legal or moral obligation upon the Collector to refrain from collecting the tax in question. (See *Amicus Curiae* Brief on Behalf of Petitioner in *Graham* v. *Goodcell*, No. 36, October Term, 1930, pp. 4-7; Petitioner's Brief, *Roy & Titcomb, Inc.* v. *U. S.*, No. 412, October Term, 1930, pp. 37-41). As has been pointed out in those

briefs, the taxpayer's contention with respect to the meaning of the word "stayed" has been accepted by the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Burden, Smith & Company,* 33 Fed. (2d) 229, and in a number of well-reasoned District Court decisions.

The argument has been advanced on behalf of the Government that since under *Graham* v. *duPont,* 262 U. S. 234, the collection of a tax may not be enjoined, there is no way in which the tax may be stayed within the legal meaning of that word.

As an example of such a stay we direct attention to Section 214 (*a*) 12 (*a*) of the Revenue Act of 1918 which provides that in the case of a material reduction in the value of inventory a claim in abatement may be filed and "in such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim * * *." Where claims in abatement and bonds are filed in such cases, then a legal stay would clearly result, the words of the statute placing a legal obligation upon the Collector to refrain from collecting the tax until the claim has been decided.

An instance in which a legal stay without the filing of a bond resulted is found in the case of *Pigott* v. *Poe,* 41 Fed. (2d) 273, in which the collection was stayed by a deposit of money in escrow. It is clear, therefore, that even though an injunction may not be obtained against the collection of taxes in spite of the fact that the statute of limitations may have run, there are instances where a claim in abatement may be filed either with or without bond under such circumstances that a legal obligation or stay is placed upon the Collector which will prevent him from enforcing the

collection of the tax. In the present case there were no facts which imposed upon the Collector any such legal or moral obligation.

Even if we assume that the word "stayed" should be interpreted as synonymous with "delayed", the facts in the present case clearly show that the filing of the claim in abatement did not delay the collection. The abatement claim herein was filed on February 25, 1924. It was rejected on August 14, 1924, and it was not until eleven and one-half months after the rejection of the claim that the tax was collected by the respondent. While the case was tried on a stipulation of facts, the stipulation provided that additional evidence might be introduced at the time of the trial, and respondent did introduce such evidence (Respondent's Exhibits A to D, inclusive, R. 22, 23). It was peculiarly within respondent's knowledge as to whether any acts took place which would show that the collection of the tax was delayed by the filing of the claims. However, no such evidence was introduced. At any time subsequent to the filing of the claim, respondent might have collected the tax in question. (Regulations 45, Art. 1032.) That he merely failed to do so does not indicate in any way that the cause thereof was the filing of the claim in abatement.

POINT IV.

If Section 611 was intended to bar actions in the courts it is void as an attempt to take property without due process of law.

The protection afforded citizens by the Fifth Amendment to the Constitution, against Federal statutes which have the effect of taking property without due process of

law, includes protection against statutes which recreate, or revive liabilities which have become extinguished through lapse of time. *Danzer and Co.* v. *Gulf and Ship Island R. R. Co.*, 268 U. S. 633, 636. *Davis* v. *Mills*, 194 U. S. 451. *The Harrisburg*, 119 U. S. 199.

In these cases this Court distinguished the earlier case of *Campbell* v. *Holt*, 115 U. S. 620 (to the effect that limitations of the time for asserting common law liabilities might legally be changed or taken away altogether), saying that in *Campbell* v. *Holt* (involving a breach of common law liability on a contract) the limitation provisions applied "to the remedy only", but pointed out that other types of limitation may "operate as a limitation upon liability."

The proposition that the running of the statute extinguished the liability for the tax necessarily forms the basis for all decisions sustaining the right of citizens to sue collectors of internal revenue, and recover sums illegally exacted as taxes, after the statutory periods of collection has run.

There are no statutes which specifically authorize suits against collectors in cases of this kind. Such actions are brought as common law actions *in assumpsit*, for moneys had and received, and are personal to the collector, and not against his office. *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1; *Levy* v. *Wardell*, 258 U. S. 542.

Limitations which bar the remedy only are matters of defense, and do not form a basis for affirmative actions such as are here involved. The lower court decisions which have held that the Statute of Limitations in cases similar to the one at bar, does not extinguish liability but merely acts as a bar to the remedy, completely overlooked the fact that unless the Statute of Limitations in tax cases extinguishes liability, it can have no operative effect whatso-

ever. In the ordinary case where the Statute of Limitation is a bar to the remedy, the person against whom a claim is asserted may defeat the claim by pleading the Statute of Limitations in Court. However, because of the statutory prohibition against injunctions in tax cases and the authority given to collectors to collect taxes by distraint, a taxpayer may not avail himself of the Statute of Limitations as a bar to collection. He can do so, however, in an affirmative suit in court to recover taxes illegally collected from him. *Bowers* v. *New York and Albany Lighterage Co., supra.*

In the present case, the Statute of Limitations had expired when the collector enforced collection. The taxpayer nevertheless had no alternative but to pay the tax in question. It is obvious, therefore, from the facts in this case that if the Statute of Limitations served merely as a bar to the remedy, it would have been a complete nullity. The basis of petitioner's action in the lower court was the fact that the liability for the taxes in question did not exist at the time when the Collector enforced collection; consequently the act of the Collector was illegal, and the petitioner was invested with the right to recover—unless that right is cut off by Section 611. It is clear, therefore, that in cases similar to the one at bar, the running of the Statute of Limitations is not in any sense a bar to the remedy of the Government; it is equally clear that it does extinguish taxpayer's liability.

Congress has recognized this to be the effect of limitations on tax collections, for Section 1106 (*a*) of the Revenue Act of 1926 expressly provided that:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax

shall not only operate to bar the remedy but shall extinguish the liability * * *."

As has been shown elsewhere in this brief, this provision was intended merely to be declaratory of the law, as it had always been, and was enacted to offset a contrary holding by the Court of Claims in the case of the *Toxaway Mills* v. *United States, supra,* as was recognized by the Solicitor General in the case of *Chapman* v. *United States, supra.*

The lower courts which have construed Section 611 as operating merely to withdraw the defense of the Statute of Limitations, upon authority of the decision in *Campbell* v. *Holt, supra,* have wholly failed to show how a mere matter of defense can form the basis for an affirmative action *in assumpsit.* It seems to have been assumed in those cases that such actions against collectors are in themselves founded upon the limitations provisions of the revenue laws. Such is not the case, as these limitations refer solely to the administrative matter of collecting taxes and make no provisions for suits for recoveries of sums collected in violation of such provisions.

Section 611 was not intended as a ratification of illegal collections of taxes made after the statutory period therefor. This Court has sustained the power of Congress to ratify illegal acts of collectors of public revenues, and to to do so even though suits for the recoveries of moneys so illegally collected were pending at the time the ratifying statutes were passed. *United States* v. *Heinszen,* 206 U. S. 370. *Rafferty* v. *Smith, Bell and Company,* 257 U. S. 226. In these cases, however, there were involved statutes which expressly ratified the illegal collections and were susceptible of no other meaning. In the *Heinszen* case this

Court pointed out that, while Congress could ratify illegal collections, "it is not to be presumed to do so on language which, literally taken, has a narrower sense" citing its decisions against implied ratifications in *Lincoln* v. *United States,* 197 U. S. 419 and *De Lima* v. *Bidwell,* 182 U. S. 1.

The power to revive a tax, like the power to ratify, may be exercised only if the rights of private parties have not intervened. *Stockdale* v. *Life Insurance Company,* 87 U. S. (20 Wall.) 323. But, as has been recognized by this Court, citizens who have suffered wrongful exactions of money by collectors of internal revenue, acting without the scope of their office, do have rights enforcible against said collectors, as individuals. This bars a revival of the tax since such rights of action are property within the meaning of the Fourteenth and Fifth Amendments to the Constitution.

If Section 611 be a ratification or revival of barred taxes it is valid or invalid by the same tests which are applied to taxes when laid in the first instance. It is well settled that Congress for all its broad powers to lay taxes must act in that respect so as to produce results conformable to the purposes of taxation, and its enactments which go beyond this and are so arbitrary and discriminatory as to amount to confiscation will not be sustained. *Brushaber* v. *Union Pacific Railroad Company,* 240 U. S. 1; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142. This is especially true as to the classification of the persons subject to the tax, as decided by this court in the case of *Schlesinger* v. *Wisconsin,* 270 U. S. 230, where it was said:

> "A classification for the purposes of taxation must rest upon some reasonable distinction."

It is possible that Congress, if it possessed the power to revive an extinguished tax, might do so as to all taxes laid and assessed, but not theretofore collected. In such cases it might be reasonable to retain all moneys illegally collected after the statutory period therefor and to require collection of all unpaid assessments. That is not the situation created under Section 611, as construed by the court below, or under any possible view of said section, as a ratifying statute. Nor does Section 611 even operate to remove the benefit of the statute of limitations from all who had by their own acts "stayed" collections of the tax. Instead, only one out of five types of cases where collections have been "stayed" is reached by the section.

(1) Section 611 does not authorize the retention of moneys illegally collected where collection was stayed by claims for credit (G. C. M. 6296—Internal Revenue Cumulative Bulletin VIII-2, p. 152).

(2) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the Revenue Act of 1928 (I. T. 3660—Internal Revenue Cumulative Bulletin VII-2, p. 82).

(3) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(4) Section 611 does not authorize collection to be made from those who stayed collection by claims in abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period thereof.

If interpreted in the manner for which the Government contends, Section 611 would apply with retroactive effect to revive a previously extinguished liability as to a limited group of taxpayers; and the classification of the group upon which the burden would fall "rests upon no reasonable distinction". It is submitted that so interpreted, Section 611 would result in the taking of property without due process of law in violation of the Fifth Amendment of the Constitution.

We therefore contend that the judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

EWING EVERETT
ROBERT N. MILLER
J. ROBERT SHERROD
ARTHUR N. COLTON
Attorneys for Petitioner

MILLER & CHEVALIER
COTTON & FRANKLIN
Of Counsel.

Dated: December 9, 1930.

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No. 529

In the Supreme Court of the United States

OCTOBER TERM, 1930

LAURA H. JENNINGS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERICK B. JENNINGS, DECEASED, PETITIONER,

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 529

LAURA H. JENNINGS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERICK B. JENNINGS, DECEASED, PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The United States does not oppose the petition in this case.

The question presented is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, should be construed to deprive the petitioner of the right which she otherwise would have had to recover taxes which had been collected after the statutory period of limitations had expired, and if so construed, whether it violates the Fifth Amendment.

This question is the same as that involved in *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*, No. 36, October Term, 1930, certiorari granted March 3, 1930; *Magee* v. *United States*, No. 65, October Term, 1930, certiorari granted May 19, 1930; *Oak Worsted Mills* v. *United States*, No. 104, October Term, 1930, certiorari granted June 2, 1930; *Taft Woolen Company* v. *United States*, No. 105, October Term, 1930, certiorari granted June 2, 1930; *Second National Bank of Saginaw* v. *United States*, No. 323, October Term, 1930, certiorari granted October 20, 1930; *Boston Pressed Metal Co.* v. *United States*, No. 337, October Term, 1930, certiorari granted October 20, 1930; and *Daniel Reeves, Inc.*, v. *Anderson, Collector*, No. 433, October Term, 1930, certiorari granted October 20, 1930. The facts are substantially the same in the instant case as in those cases. In the instant case the suit was brought before the passage of the Revenue Act of 1928.

The pertinent dates in the instant case are as follows (R. 36–38):

March 15, 1919, return for 1918 filed.

February 8, 1924, assessment of additional tax.

February 25, 1924, claim in abatement filed.

March 15, 1924, expiration of five-year period for assessment and collection of tax.

August 14, 1924, claim in abatement rejected.

July 30, 1925, additional tax paid.

September 19, 1925, claim for refund filed.

May 13, 1926, claim for refund rejected.

December 6, 1927, suit commenced.

The District Court for the Southern District of New York entered judgment on a directed verdict in favor of the petitioner. (R. 31–32.) The United States Circuit Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the cause for a new trial (R. 56), following its decision in *Daniel Reeves, Inc.*, v. *Anderson, supra.* (R. 55.)

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Since the same question is already before this Court in several pending cases, the United States does not oppose the granting of the writ of certiorari.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
J. LOUIS MONARCH,
NORMAN D. KELLER,
Special Assistants to the Attorney General.

NOVEMBER, 1930.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 565

WRIGHT & TAYLOR, INC., PETITIONER,

vs.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1930

CERTIORARI GRANTED DECEMBER 8, 1930

(35,487)

(35,487)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 565

WRIGHT & TAYLOR, INC., PETITIONER,

vs.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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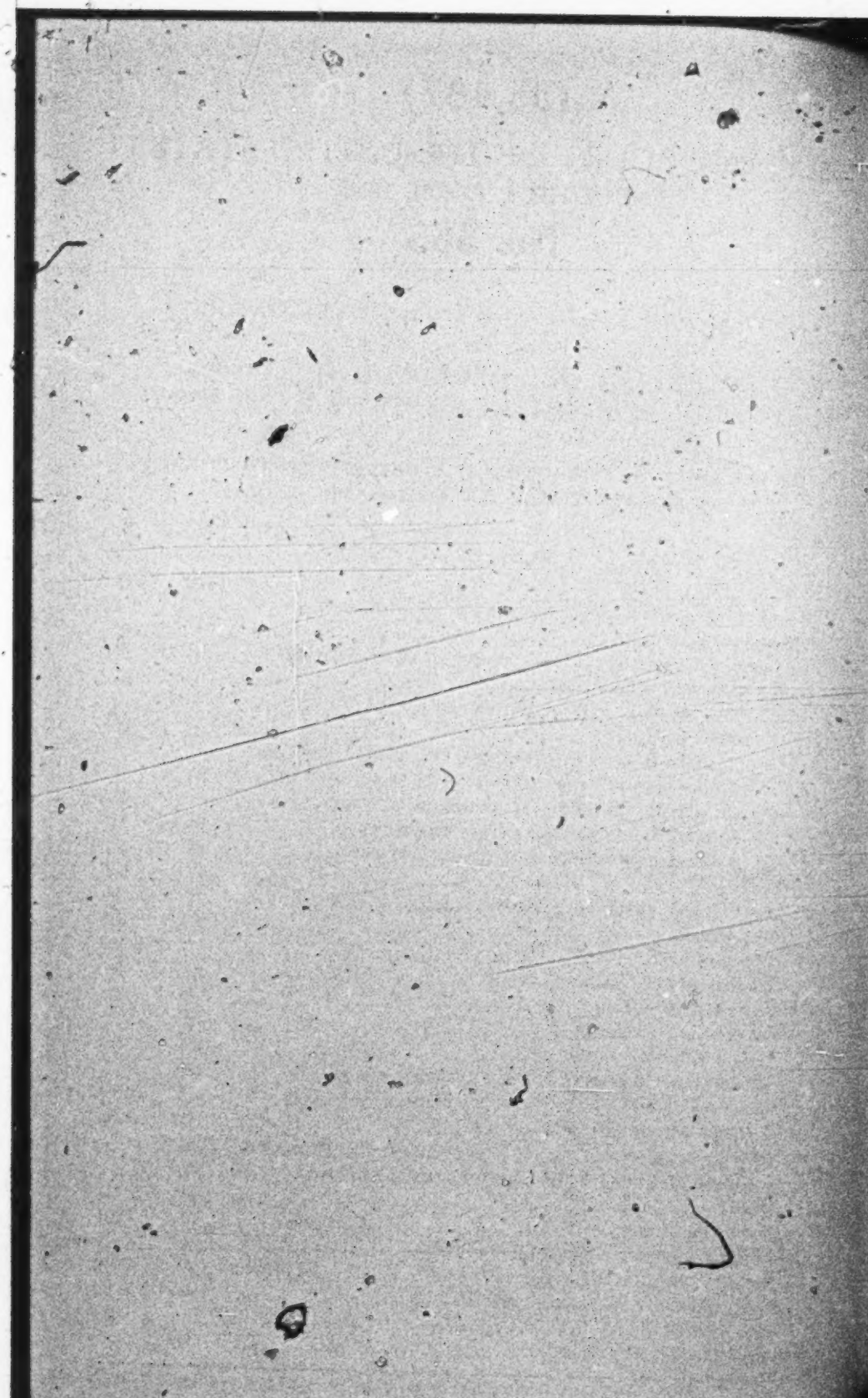

[fols. a & 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

Present: Honorable Chas. I Dawson, Judge.

#927

WRIGHT & TAYLOR, INCORPORATED, Plaintiff,

v.

ROBERT H. LUCAS, Collector of Internal Revenue for the United States of America, Defendant

PETITION—Filed April 14, 1927

The plaintiff, Wright & Taylor, Inc., states that it is a corporation organized and existing under and by authority of the laws of the State of Kentucky, with authority to sue and be sued in its corporate name; that its principal office and place of business is in Louisville, Ky., that the defendant, Robert H. Lucas, is a duly appointed and acting Collector of Internal Revenue for the United States of America for the Fifth District of Kentucky and as such demanded and collected the sums of money hereinafter referred to, and which are sought to be recovered in this action.

The amount in controversy in this action exceeds the sum of $3,000.00, exclusive of interests and costs, and the defendant, Robert H. Lucas, is a resident and citizen of Jefferson County, Ky.

The plaintiff states that heretofore it made a return of gross and net income collected by it for the fiscal year ending June 30, 1918, as required by the Revenue Act of 1917 and the Revenue Act of 1918; that its said return for the [fol. 2] year ending June 30, 1918, under the Revenue Act of 1917 was filed during the month of August, 1918; that on or about June 14, 1919, it filed a supplemental return for the fiscal year ending June 30, 1918, as required by the Revenue Act of 1918; that its return filed in August, 1918, for the fiscal year ending June 30, 1918, as required

by the Revenue Act of 1917, showed a total tax due, computed under the provisions of the Revenue Act of 1917 and the Revenue Act of 1916, as amended by the Revenue Act of 1917 without the benefit of Section 210 of the said Revenue Act of 1917, of $240,077.31; that it thereupon made application to the Commissioner of Internal Revenue to have its profits tax for the 1917 portion of the fiscal year ending June 30, 1918, determined and assessed in accordance with the provisions of Section 210 of the Revenue Act of 1917; that in December, 1918, after an oral conference in the office of the Commissioner of Internal Revenue at Washington, D. C., it was notified that its application for the assessment of its profits tax under Section 210 of the Revenue Act of 1917 was granted, and that the total tax due for the year ending June 30, 1918, computed under the Revenue Act of 1917 was $165,788.32, of which one half, or $82,894.16 was the amount due for the 1917 half of the year ending June 30, 1918; that in December, 1918, it filed a claim for abatement of $74,288.99 income and profits taxes for the year ending June 30, 1918, this being the difference between the amount shown to be due on the original return and the total tax due after the profits tax had been computed by the Commissioner of Internal Revenue under Section 210 of the Revenue Act of 1917.

The plaintiff states that on or about June 14, 1919, it filed a supplemental return for the year ending June 30, 1918, as required by the Revenue Act of 1918; that said supplemental return showed an additional income and profits tax due for the 1918 half of the year ending June 30, 1918, under the provisions of the Revenue Act of 1918 of $85,186.71; that of this amount $31,462.86 was paid at the time of the said supplemental return was filed, and that on the same date a claim for the abatement of the balance, to-wit: $53,723.85, was filed with the Collector of Internal Revenue at Louisville, Kentucky; that in September, 1919, it received notice of an additional assessment of income and profits taxes for the year ending June 30, 1918, in the sum of $26,376.29 and at the same time payment of this amount was demanded by the Collector of Internal Revenue, Louisville, Kentucky, and the plaintiff filed with the [fol. 3] Collector of Internal Revenue at Louisville, Kentucky, a claim for abatement of the entire amount of $26,376.29.

The plaintiff states that no other assessments were made and that no steps were taken or proceedings instituted to effect collection of any of the above amounts, or any part thereof, until August 27, 1925, at which time the defendant, Robert H. Lucas, Collector of Internal Revenue at Louisville, Ky., demanded payment of $136,507.05, together with a large amount of interest as additional income and profits taxes alleged to be due for the fiscal year ending June 30, 1918; that after the said defendant Robert H. Lucas threatened to seize and sell the property of the plaintiff unless payment was made, the plaintiff paid the said defendant, on September 4, 1925, the sum of $62,319.16, plus interest of $22,490.35 making a total payment of $84,809.51; that the entire amount was paid under protest and duress in order to avoid the carrying out of the defendant's threat to seize and sell the plaintiff's property.

The plaintiff states that on or about September 30, 1925, it filed with the defendant, Robert H. Lucas, Collector of Internal Revenue at Louisville, Kentucky, a claim for refund of the entire sum of $84,809.51, referred to above; that more than six months have elapsed since said claim was filed and that said claim for refund has never been allowed or rejected by the defendant, or the Commissioner of Internal Revenue, or any one else authorized to pass on said claim; a copy of said claim for refund is filed herewith marked Exhibit "A."

The plaintiff states that at the time the taxes and interest herein sued for were paid by it to the defendant under protest and duress, there was no waiver or other agreement, extending the time for assessment or collection of any income or profits taxes beyond that fixed by the statutes, then in effect; that on or about December 13, 1923, the plaintiff had signed such a waiver or agreement and delivered it to the Commissioner of Internal Revenue; that said waiver or agreement by its terms and as one of the conditions therein expired one year from date thereof; that said waiver or agreement expired on December 13, 1924.

The plaintiff states that by the terms of Section 250 (d) of the Revenue Act of 1921, it is provided that no suit or proceeding for the collection of any income or profits taxes claimed to be due for any fiscal year ending in the year 1918 shall be begun after the expiration of five years after the

[fols. 4 & 5] return was filed; that the plaintiff filed its income and profits tax return for the year ending June 30, 1918, upon the dates herein stated, to-wit: the return for the 1917 half of the fiscal year ending June 30, 1918, was filed on or about August 15, 1918, as required by the Revenue Act of 1917, and a supplemental return for the 1918 half of the fiscal year ending June 30, 1918, was filed on or about June 14, 1919, as required by the Revenue Act of 1918, and Treasury decision #2650 promulgated thereunder; that no suit or proceeding for the collection of any additional income or profits taxes for the year ending June 30, 1918, was begun prior to August 28, 1925, when the plaintiff was threatened with a distraint proceeding unless the additional income and profits taxes of $62,319.16 plus interest in the sum of $22,490.35 sued for herein was paid; that at that time, to-wit: August 28, 1925, more than five years had elapsed since the plaintiff's income and profits tax returns had been filed as required by law and the threatened distraint proceedings were illegal and void by reason of the expiration of said five year period; that the collection of said income and profits tax for the year ending June 30, 1918, in the sum of $62,319.16 and interest in the sum of $22,490.35 was illegal and void and the entire amount, to-wit, $84,809.51 is now due and owing to the plaintiff from the defendant, Robert H. Lucas, together with interest from September 4, 1925; that the plaintiff had demanded payment of said amount from the defendant, but no part of same has been paid.

Wherefore, the plaintiff, Wright & Taylor, Inc., prays for judgment against the defendant, Robert H. Lucas, Collector of Internal Revenue for the United States of America, in the sum of eighty-four thousand, eight hundred and nine dollars and fifty-one cents ($84,809.51), together with interest at the rate of 6% per annum from September 4, 1925, until paid, for its cost herein expended and for all further and proper relief.

S. Lyman Barber, Miller & Chevalier, Attorneys for Plaintiff.

Duly sworn to by Thomas B. Bullitt. Jurat omitted in printing.

[fol. 6] EXHIBIT "A" TO PETITION

(Execute Separate Form for Each Tax Period)

Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S. January 18, 1922.

Important: File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Collector's Notation: District: ——. Account number: ——. Date received: ——. Stamp here: —— ——, Collector of Internal Revenue.

Date received by Administrative Unit: ——. Stamp here: —— ——.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Claim for

☐ Abatement of Tax Assessed
☐ Credit Against Outstanding Assessments
☐ Refund of Taxes Illegally Collected
☐ Refund of Amounts Paid for Stamps Used in Error or Excess

STATE OF KENTUCKY,
County of Jefferson, ss:

Type or Print: (Name of taxpayer or purchaser of stamps) Wright & Taylor, Inc., (Residence—give street and number as well as city or town and State) Francis Building, (Business address) Louisville, Ky.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From July 1	1917
To June 30	1918

1. Business in which engaged: Owner and operator of Office Building.

2. Character of assessment or tax: Income and profits tax. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: Tax paid $277,452.42; Int. pd. 22,490.35 $299,942.77

4. Reduction of Tax Liability requested (Income and Profits Tax): Tax $62,319.16; Int. 22,490.35 ..... 84,809.51

5. Amount to be abated ....

[fol. 7] 6. Amount to be refunded (or such greater amount as is legally refundable 84,809.51

7. Dates of payment (see Collector's receipts or indorsements of canceled checks). (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: Louisville, Ky.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit ....

11. Unpaid assessment against which credit is asked; period from —— —, ——, to —— —, —— ....

Deponent verily believes that this application should be allowed for the following reasons:

In August, 1918, this taxpayer filed its return for the year ending June 30, 1918, under the Revenue Act of 1917. The total tax shown to be due under the technical provisions of the Revenue Act of 1917 amounted to $240,077.31. The taxpayer then requested that its tax liability for the year ending June 30, 1918, be determined under Section 210 of the Revenue Act of 1917. This application was granted and the total tax for the year was fixed at $165,788.32, with the understanding that an adjustment would be made for the 1918 half of the year, under the Revenue Act of 1918. The taxpayer was directed by the Commissioner of Internal Revenue to pay this amount, and file a claim for abatement for the balance of $74,288.99. This was done in December, 1918. On June 14, 1919, the taxpayer filed its supplemental return for the 1918 half of the fiscal year ending June 30, 1918, in accordance with the Revenue Act of 1918, showing

additional taxes due in the sum of $85,186.71 for the 1918 half of the taxable year ending June 30, 1918, of this amount $31,462.86 was paid June 14, 1919, and claim for abatement of the balance was filed. In Sept., 1919, the taxpayer received notice and demand of additional taxes for the year ending June 30, 1918, in the sum of $26,376.29. We have no information as to when this assessment was actually made by the Commissioner of Internal Revenue, but it appeared on the Collector's list of August, 1919, page 9, line 3. A claim for abatement covering this additional assessment was also filed.

After the above assessments were made, and claims for abatement filed no steps were taken or proceedings instituted by the Commissioner to effect the collection of the assessments until August 27, 1925, when a representative of the local collector's office appeared at the office of this taxpayer and demanded a waiver for the year ending June 30, 1918, and when a waiver was refused, the levying of an immediate distraint for $62,319.16 taxes and $22,490.35 interest was threatened. In order to avoid the carrying out of the threat to distrain and sell the property of this taxpayer, it paid the entire amount of the tax in the sum of $62,319.16 and interest in the sum of $22,490.35 under protest and duress on Sept. 4, 1925.

Since the assessments involved here were made prior to the passage of the Revenue Act of 1924, their collection is controlled by the Revenue Act of 1921, and since it is clear that more than five years had elapsed since the assessments were made and before any proceedings were begun to collect the taxes claimed to be due, it is submitted that collection of all of these assessments was barred by the statute of limitations and the threatened distraint was illegal.

It is also submitted that no part of the tax of $62,319.16 or interest of $22,490.35 was in fact due, because the income and profits taxes in question were the result of the disallowance of assessment of the profits tax for the 1917 half of the year ending June 30, 1918, under Section 210 of the Revenue Act of 1917, which matter had been adjudicated by a former Commissioner with all the facts before him, and the disallowance of obsolescence of good will for the 1918 half of the year, which had previously been allowed us.

An oral conference is requested when this matter is ready for consideration by the Department.

[fol. 8] IN UNITED STATES DISTRICT COURT

AMENDED PETITION—April 2, 1928

The plaintiff, Wright & Taylor, Inc., by leave of the Court, amends its petition herein and states as follows: That after its supplemental income tax return for the fiscal year ending June 30, 1918, was filed on or about June 14, 1919, the Commissioner of Internal Revenue computed and made a final determination of the income and profits tax liability of the plaintiff for the year ending June 30, 1918, and issued a letter setting forth the detailed computation of said final determination. A copy of said letter is filed herewith and made a part hereof marked Exhibit "B."

The plaintiff states that the said letter determined that total taxes due for the 1917 half of the fiscal year ending June 30, 1918, computed under Section 210 of the Revenue Act of 1917, was $82,894.16, and that the total tax for the 1918 half of said fiscal year computed under the provisions of the Revenue Act of 1918 was $183,559.44, making a total tax of $266,453.60 for the fiscal year ending June 30, 1918, and that in addition to the $240,077.31 shown to be due on the plaintiff's original return an additional assessment of $26,376.29 for said fiscal year ending June 30, 1918, was indicated.

The plaintiff states further that in accordance with the said final determination of income and profits taxes due for the said fiscal year ending June 30, 1918, the Commissioner of Internal Revenue did in fact make an additional assessment of income and profits taxes for said year in the sum of $26,376.29, in August, 1919, and the Collector of Internal Revenue at Louisville, Kentucky, issued his notice and demand for the payment of said amount. The original "duplicate" of said notice and demand is filed herewith marked Exhibit "C."

The plaintiff states that no other assessment of income or profits taxes for the fiscal year ending June 30, 1918, was made after the assessment of August, 1919, and that

said sums of $240,077.31 and $26,376.29, or a total of $266,-453.60 constituted the only valid and outstanding assessments then in existence and that no other outstanding assessment was in existence on August 27, 1925, when the defendant, Robert H. Lucas, Collector of Internal Revenue, demanded and collected of the plaintiff $62,319.16 as additional income and profits taxes for the said fiscal year plus interest in the sum of $22,490.35, making the total amount of $84,809.51 demanded and collected on said accounts.

[fol. 9] The plaintiff states it paid income and profits taxes for the fiscal year ending June 30, 1918, in the sum of $215,133.93; and that the Commissioner of Internal Revenue and the defendant, Robert H. Lucas, credited a refund of $3,674.73 due the plaintiff on account of overpayment of income taxes for the fiscal year ending June 30, 1920, on the unpaid assessment for the fiscal year ending June 30, 1918. The plaintiff states that said credit was entered on or about November 25, 1924, and a copy of the certificate of overassessment and credit is filed herewith and made a part hereof, marked Exhibit "D." The plaintiff states further that the Commissioner of Internal Revenue and the defendant, Robert H. Lucas, credited a refund of $399.03 due the plaintiff on account of overpayment of income taxes for the fiscal year ending June 30, 1922, on the unpaid assessment for the fiscal year ending June 30, 1918. The plaintiff states that said credit was entered on or about November 25, 1924, and a copy of the certificate of overassessment and credit is filed herewith and made a part hereof, marked Exhibit "E."

The plaintiff states that by reason of the above payments and credits it is entitled to credit of total payments of $219,207.64 to be applied against the total income and profits taxes due for the fiscal year ending June 30, 1918; that after crediting said payments against the total assessment of $266,453.60 for the said year a deficit in payment of only $47,245.91 remained at the time the defendant demanded and collected $62,319.16 additional income and profits taxes, plus interest of $22,490.35, from the plaintiff, and that it is entitled to recover from the defendant $20,-695.83 irrespective of the statute of limitations as to collection, for the reason that no valid assessment was in ex-

istence at the time it was collected under threat of distraint.

The plaintiff reiterates and reaffirms each and all its allegations in its original petition herein, setting forth its claim that the collection of the entire amount of tax and interest sued for herein was barred by the statute of limitations at the time of collection under threat of distraint.

Wherefore, plaintiff prays as in its original petition herein.

S. Lyman Barber, Miller & Chevalier, Attorneys for Plaintiff.

[fol. 10] *Duly sworn to by Thomas B. Bullitt. Jurat omitted in printing.*

EXHIBIT B TO AMENDED PETITION

Copy

Office of Commissioner of Internal Revenue.
IT:T:SM. GWJ—51,750,632. (A-2 letter, Revised.)

Treasury Department, Washington

July 18, 1919.

Wright and Taylor, distillers and wholesale liquor dealers, 123 West Main Street, Louisville, Kentucky.

SIRS: Further reference is made to your sundry letters, telegrams, and personal conferences concerning your income and excess profits tax returns for the fiscal year ended June 30, 1918. In direct answer to your telegram of July second, you are advised that the statutes do not permit the constructive capital determined under Section 210 of the Act of October 3, 1917, to be used in making supplemental returns for the same fiscal year under the Revenue Act of 1918.

Your original income and excess profits tax returns for the year ended June 30, 1918, were filed under the provisions of the Act of 1917, indicating a tax of $240,077.31. The tax, however, was finally adjusted under Section 210 [fol. 11] of the Revenue Act of 1917 upon the basis of a constructive capital of $2,251,523.70, and a taxable net income of $652,941.85, the result of which was a total tax for the fiscal year, computed under the 1917 Act, of $165,788.32,

one-half of which, or $82,984.16, was the proper proportion for six months of the year 1917.

The second half of the taxable year is assessed under the provisions of the Act of 1918, and the amount of $183,559.44 should be added to the sum of $82,894.16, taxed for the six months of the year 1917, resulting in a total tax for the fiscal year ended June 30, 1918, of $266,453.60, subject to revision under your application for adjustment as provided in Sections 327 and 328 of the Act of 1918.

Complete summary of computations referred to in the foregoing paragraphs is as follows:

Tax Calculated under the Provisions of the Act of 1917

Adjusted capital under Section 210			$2,251,523.70
9% deduction	$202,637.13		
Specific allowance	3,000.00		
Total deduction			205,637.13
Net income as reported	$666,106.52		
Plus interest on U. S. bonds, excess $5,000	1,835.33		
	$667,941.85		
Less dividends (1913)	15,000.00		
Net income subject to excess profits tax			652,941.85
Excess profits tax for full year			134,491.42
Net income	$666,106.52		
Less excess profits tax	134,941.42		
	$531,615.10	2%	$10,632.30
Less 1913 dividends	15,000.00		
	$516,615.10	4%	$20,664.00
Income tax			31,296.90
Total tax for full year under 1917 law			165,788.32
Six-twelfths of which is applicable to taxable year			82,894.16

Tax Calculated under the Provisions of the Act of 1918

Net income for taxable year			$646,903.06
Invested capital as reported			$1,469,254.71
[fol. 12] Excess profits credit:			
8% of capital	$117,540.38		
Specific exemption	3,000.00		
		$120,640.38	
War profits credit:			
Average prewar	$154,489.36		
Plus 10% increase	77,693.88		
Specific exemptions	3,000.00		
		$335,183.24	
Total war profits and excess profits tax			$329,375.86
Net income		$646,903.06	
Less interest	$1,002.00		
War profits	329,375.86		
Specific	2,000.00		
		$332,377.86	
Amount subject to income tax		$314,425.20	
12%			37,743.02
Total war and excess profits and income taxes for full taxable year			$367,118.88
Six-twelfths applicable for second half of fiscal year			183,559.44

Summary

Amount of taxes for the first six months of the taxable year under Section 210, Act of 1917	$82,894.16
Amount of taxes for the second six months of the taxable year under Section 301, Act of 1918	183,559.44
Total assessment for fiscal year ended June 30, 1918	266,453.60

Your original return shows that assessment was made on August, 1918, list, page 8, line 5	240,077.31
Indicating an additional assessment	$26,376.29

Your application for assessment under the provisions of Section 210 of the 1917 Act was allowed, resulting in a tax of $82,894.16 for the proportionate part of your fiscal year covered by the period from July 1, 1917, to December 31, 1917, and is final.

That part covered by the period from January 1, 1918, to December 31, 1918, for which application is made for assessment under the provisions of Sections 327 and 328 [fol. 13] of the 1918 Act, is payable, until definitely determined, at the rate of fifty per cent of net income as war profits and excess profits taxes which is $161,725.77, and an income tax of twelve per cent of income, less war profits and excess profits taxes $161,725.77. Interest on obligations of the United States not exempt, $501.00; and specific allowance of $1,000.00 or a total deduction before computing the twelve per cent tax of $163,226.77, indicating $160,224.77 subject to income tax of $19,226.97, resulting in a present settlement as follows:

Total tax under 1917 Act		$82,894.16
Fifty per cent tax under 1918 Act:		
War and excess profits taxes	$161,725.77	
Income tax @ 12%	19,226.97	
		180,952.74
Amount of tax payable		$263,846.90
It appears an actual cash payment has been made to the amount of		165,788.32
Indicating a balance due of		$98,058.58

Any cash payment made in excess of the amount stated above will apply against the balance shown to be due. You will be advised by the collector of Internal Revenue for the Fifth District of Kentucky as to the time and manner of payment of the additional amount due.

Respectfully, (Sgd.) J. H. Callan, Assistant to the Commissioner.

[fol. 14] EXHIBIT C TO AMENDED PETITION

Duplicate

Treasury Department, U. S. Internal Revenue.
Form 1-17.
Collector's Office, District of Kentucky, at Louisville, Ky.
Date: 10/4/1919.
Due date: 10/14/1919.
Elwood Hamilton, Collector of Internal Revenue.
Wright & Taylor, 133 W. Main St., Louisville, Ky.

Notice and Demand for Tax and Receipt—Regular Taxes

List 23B-1909, Aug. 9-9-3, year-month-folio-line #199-A:2 letter 7-18-19.

Character of tax liability: For period ended fiscal year 6-30-18, taxes, penalties, etc.

Amount of tax	$26,376.29
50 per cent penalty	
100 per cent penalty	
5 per cent penalty	
Total	26,376.29

Received payment.

——, Collector of Internal Revenue.

2-2803.

[fol. 15] EXHIBIT D TO AMENDED PETITION

Copy

Treasury Department, Office of Commissioner of Internal Revenue, Washington

Income Tax Unit.
IT:R:CC.
Certificate of Overassessment Number: 687,901.
Allowed: $3,634.73.
Schedule No. 11981.

Wright and Taylor, Inc., Louisville, Kentucky.

SIRS: An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you

for the fiscal year period ended June 30, 1920 indicates that the tax assessed for this year was in excess of the amount due:

Original assessment Acct. #402722	$11,794.40
Corrected tax liability	8,159.67
Overassessment	$3,634.73

The above adjustment is due to the allowance of additional depreciation in the amount of $16,534.87.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated: if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Respectfully, J. G. Bright, Deputy Commissioner, by (Sgd.) F. R. Clente, Head of Division.

Abated: $——.
Credited: $3,634.73.
Year: Fisc. 6/30/18.
Account No. Aug. 18—5.
Refunded: $——.
Instructions executed. Signature: Robert H. Lucas, Collector Int. Rev., —— District, of Nov. 25, 1924.

[fol. 16] EXHIBIT E TO AMENDED PETITION

Copy

Treasury Department, Office of Commissioner of Internal Revenue, Washington

Income Tax Unit.
IT:R:CC.
Certificate of Overassessment Number: 687,990.
Allowed: $399.03.
Schedule No. 11981.

Wright and Taylor, Inc., Louisville, Kentucky.

Sirs: An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you

for the fiscal year period ended June 30, 1922 indicates that the tax assessed for this year was in excess of the amount due:

Original assessment, Acct. #401,917	$16,605.87
Corrected tax liability	16,206.84
Overassessment	$399.03

The above adjustment is due to the allowance of additional depreciation in the amount of $18,688.01.

The amount of the overassessment will be abated, credited, or refunded as indicated below (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Respectfully, J. G. Bright, Deputy Commissioner, by (Sgd.) F. R. Clente, Head of Division.

Refunded: $——.
Abated: $——.
Credited: $399.03.
Year: Fisc. 6/30/18.
Account No. Aug. 18—5.
Instructions executed. Signature: Robt. H. Lucas, Collector Int. Rev., —— District, of Nov. 25, 1924.

[fol. 17] IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 8, 1929

Comes now the defendant, Robert H. Lucas, Collector of Internal Revenue for the United States of America, Fifth District of Kentucky, and for answer to so much of plaintiff's petition as he is advised he should make answer to admits that the plaintiff, Wright & Taylor, is a corporation organized and existing under and by authority of the laws of the State of Kentucky, with authority to sue and be sued, in its corporate name, and that its principal office and place of business is in Louisville, Kentucky.

Defendant admits that he is and at all times mentioned herein a duly appointed and acting collector of Internal

Revenue for the United States of America for the Fifth District of Kentucky, and as such demanded and collected the sums of money hereinafter referred to, which said sums are sought to be recovered in this action.

Defendant admits that the amount in controversy in this action exceeds the sum of $3,000.00, exclusive of interests and costs and that the defendant, Robert H. Lucas, is a resident and citizen of Jefferson County, Kentucky.

Defendant admits that heretofore the plaintiff made a return of gross and net income collected by it for the fiscal year ending June 30, 1918, as required by the Revenue Act of 1917 and the Revenue Act of 1918 and that its said Return for the year ending June 30, 1918, under the Revenue Act of 1917 was filed during the month of August, 1918; and that on or about June 14, 1919, it filed a supplemental return for the fiscal year ended June 30, 1918, as required by the Revenue Act of 1918; and that its return filed in August, 1918, for the fiscal year ending June 30, 1918, as required by the Revenue Act of 1917, showed a total tax due, computed under the provisions of the Revenue Act of 1917 and the Revenue Act of 1916, as amended by the Revenue Act of 1917 without the benefit of Section 210 of the said Revenue Act of 1917, of $240,077.31; admits that plaintiff thereupon made application to the Commissioner of Internal Revenue to have its profits tax for the year 1917 portion of the fiscal year ending June 30, 1918, determined and assessed in accordance with the provisions of Section 210 of the Revenue Act of 1917; and that in December, 1917, after an oral conference in the office of the Commissioner of Internal Reveune at Washington, D. C., it was notified that its application for the assessment of its profits tax under Section 210 of the Revenue Act of 1917 was granted, and that the total tax due for the year ending June 30, 1918, computed under [fol. 18] the Revenue Act of 1917 was $165,788.32, of which one-half, or $82,894.16 was the amount due for the 1917 half of the year ending June 30, 1918; and that in December, 1918, it filed a claim for abatement of $74,288.89 income and profits taxes for the year ending June 30, 1918, this being the difference between the amount shown to be due on the original return and the total tax due after the profits tax had been computed by the Commissioner of In-

ternal Revenue under Section 210 of the Revenue Act of 1917.

Defendant admits that on or about June 14, 1919, the plaintiff filed a supplemental return for the year ending June 30, 1918, as required by the Revenue Act of 1918, and that said supplemental return showed an additional income and profits tax for the year 1918, half of the year ending June 30, 1918, under the provisions of the Revenue Act of 1918 of $85,186.71; and that of this amount $31,462.86 was paid at the time the said supplemental return was filed, and that on the same date a claim for the abatement of the balance, to wit, $53,723.85, was filed with the Collector of Internal Revenue at Louisville, Kentucky; and that in September, 1919, it received notice of an additional assessment of income and profits taxes for the year ending June 30, 1918, in the sum of $26,376.29, and at the same time payment of this amount was demanded by the Collector of Internal Revenue, Louisville, Kentucky, and the plaintiff filed with said Collector of Internal Revenue, at Louisville, Kentucky, a claim for abatement of the entire amount of $26,376.29.

Defendant admits that no other assessments were made and that no steps were taken or proceedings instituted to effect collection of any of the above amounts, or any part thereof, until August 27, 1925, at which time the defendant, Robert H. Lucas, Collector of Internal Revenue at Louisville, Kentucky, demanded payment of $136,507.05, together with a large amount of interest, as additional income and profits taxes alleged to be due for the fiscal year ending June 30, 1918; and that after the said defendant, Robert H. Lucas threatened to seize and sell the property of the plaintiff unless payment was made, the plaintiff paid the defendant, on September 4, 1925, the sum of $62,319.16, plus interest of $22,490.35, making a total payment of $84,809.51; but denies that the entire amount was paid under protest and duress in order to avoid the carrying out of the defendant's threat to seize and sell the plaintiff's property.

[fol. 19] Defendant admits that on or about September 30, 1925, plaintiff filed with the defendant, Robert H. Lucas, Collector of Internal Revenue at Louisville, Kentucky, a claim for refund of the entire sum of $84,809.51, referred to above; that more than six months have elapsed since said

claim was filed and that said claim for refund has never been allowed or rejected by the defendant, or the Commissioner of Internal Revenue, or any one else authorized to pass on said claim.

Defendant denies that at the time the taxes or interest herein sued for were paid by the plaintiff to the defendant under protest or duress; or there was no waiver or other agreement extending the time for assessment or collection of any income or profits taxes beyond that fixed by the statute, then in effect; but admits that on or about December 13, 1923, the plaintiff had signed such a waiver or agreement and delivered it to the Commissioner of Internal Revenue, but denies that said waiver or agreement by its terms or as one of the conditions therein expired one year from date thereof or that said waiver or agreement expired on December 13, 1924, or any date prior to the filing of plaintiff's petition.

Defendant admits that by the terms of Section 250 (d) of the Revenue Act of 1921, it is provided that no suit or proceeding for the collection of any income or profits taxes claimed to be due for any fiscal year ending in the year 1918 shall be begun after the expiration of five years after the return was filed, and that the plaintiff filed its income and profits tax return for the year ending June 30, 1918, upon the dates herein stated, to-wit, the return for the 1917 half of the fiscal year ending June 30, 1918, was filed on or about August 15, 1918, as required by the Revenue Act of 1917, and a supplemental return for the 1918 half of the fiscal year ending June 30, 1918, was filed on or about June 14, 1919, as required by the Revenue Act of 1918, and Treasury decision #2650 promulgated thereunder; but denies that no suit or proceeding for the collection of any additional income or profits taxes for the year ending June 30, 1918, was begun prior to August 28, 1925, or that the plaintiff was threatened with a distraint proceeding unless the additional income and profits taxes of $62,319.16 plus interest in the sum of $22,490.35 sued for herein was paid; and denies that at that time, to-wit, August 22, 1925, more than five years had elapsed since the plaintiff's income and profits tax returns had been filed as required by law, or that the threatened distraint proceedings were illegal or void by [fol. 20] reason; denies that the collection of said income and profits tax for the year ending June 30, 1918 in the sum

of $62,319.16, or interest in the sum of $22,490.35 was illegal or void or the entire amount, to-wit, $84,809.51 or any sum is now due or owing to the plaintiff from the defendant, Robert H. Lucas, with interest from September 4, 1925, or from any time, or that plaintiff has demanded payment of said amount from the defendant, or that no part of same has been paid.

II

Defendant for further answer to the petition of plaintiff states that upon the filing of claim in abatement in the sum of $74,288.99 for balance due upon the original assessment of $240,077.31, and upon the filing of claim in abatement in the sum of $53,723.80, balance due made upon the filing of the supplemental return on or about June 17, 1919; upon the filing of claim in abatement for $26,376.29, for additional assessment made by the Commissioner on the return for 1918, which claims were filed on December 12, 1918, and September 15, 1919, the collection of the tax in question was stayed. The filing of claims in abatement having been made in the time required within the period for collection and assessment, and under the provisions of Section 611 of the 1928 Revenue Act the collection of $62,319.16 additional income and profits tax, plus interest of $22,490.35, upon the dates mentioned by the plaintiff was not an over-payment and the collection of same was in all respects legal and valid according to the provisions of Section 611 of the Act of 1928.

Wherefore having fully answered defendant prays that plaintiff's petition herein may be dismissed and held for naught; for his costs herein expended and for all further proper relief to which he may be entitled.

T. J. Sparks, United States Attorney. Of Counsel:
Frank A. Ropke, Ast. U. S. Attorney.

[fol. 21] In United States District Court

Reply—Filed April 8, 1929

Comes now the plaintiff, Wright and Taylor, Inc., and for reply to defendant's answer herein admits that claims in

abatement in the respective amounts of $74,288.99, $53,723.80 and $26,376.29 were filed at the times stated in said answers; but denies that collection of the taxes or any part thereof covered by said claims in abatement were stayed thereby.

Plaintiff also denies that Section 611 of the Revenue Act of 1928 made the collection of $62,319.16 additional income and profits tax plus interest $22,490.35 legal and/or valid.

Paragraph II

Plaintiff avers that the abatement claim mentioned in defendant's answers did not under the practice, prevailing at the time they were filed, stay the collection of taxes covered thereby or any part thereof, and that, in accordance with the law, the regulations then in force and the practice thereunder, said defendant Collector, notwithstanding said claims in abatement, had the legal right to demand and collect all, or any part, of said taxes at any time prior to the expiration of five years from the time the income tax return for the year involved was due.

Paragraph III

Plaintiff avers that Section 611 of the Revenue Act of 1928 does not attempt to validate or authorize retroactively the illegal action of the defendant in collecting from the plaintiff the said sum of $84,809.47, and, that if it does that such Section is in contravention to article V of the Constitution of the United States of America, in that it deprives plaintiff of its property without due process of law and is, therefore, unconstitutional, null and void.

Wherefore, having fully replied to the defendant's answer herein, the plaintiff prays as in its original petition.

S. Lyman Barber, Ward Loveless, Miller & Chevalier, Attorneys for Plaintiff.

[fol. 22] In United States District Court

Stipulation of Facts—Filed April 8, 1929

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the fol-

lowing facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

I

That the plaintiff is a corporation duly organized and existing under and by authority of the laws of the State of Kentucky with its principal office and chief place of business at Louisville, Kentucky.

II

That the defendant is now and has been since the 24th day of May, 1921, Collector of Internal Revenue for the Third Collection District of Kentucky, with his residence at Louisville, Kentucky, within the jurisdiction of this court, and that the tax sought to be recovered in this case was paid to the said Lucas as Collector of Internal Revenue.

III

On August 10, 1918, the plaintiff, Wright & Taylor, Inc., filed with the Collector of Internal Revenue at Louisville, Kentucky, a return of gross and net income for the fiscal year ended June 30, 1918, showing thereon a total tax liability of $240,077.31.

IV

The said sum of $240,077.31 was assessed by the Commissioner of Internal Revenue in August, 1918.

V

On March 15, 1919, the plaintiff filed a tentative return covering the six-months' period January 1, 1918, to June 30, 1918, at the rates provided by the Revenue Act of 1918, showing a tax estimated at $71,528.32 of which $17,882.08 was paid when said tentative return was filed. On June 17, 1919, plaintiff filed a completed return for the fiscal year ended June 30, 1918, showing an additional tax due for said year in the sum of $85,186.71, which amount was duly as-

[fol. 23] sessed by the Commissioner of Internal Revenue on September 12, 1919.

VI

On August, 1919, assessment list, the Commissioner of Internal Revenue assessed a further tax against the plaintiff for the year ended June 30, 1918, in the sum of $26,376.29.

VII

On September 15, 1919, the plaintiff filed with the Collector of Internal Revenue at Louisville, Kentucky, a claim for abatement of the entire amount of $26,376.29, and after the filing of said abatement claim neither defendant, not any other person representing the United States Government, took any steps whatsoever for the collection of said taxes covered by said abatement claim, until on or about, to-wit, September 8, 1925, when said defendant collected of plaintiff the sum of $84,809.47 as set out in paragraph ten (10) hereof.

VIII

Of the assessment of $240,077.31 made in August, 1918, the plaintiff paid the Collector of Internal Revenue on December 12, 1918, the sum of $165,788.32 and on the same date a claim for abatement in the sum of $74,288.99 was filed by the plaintiff. On November 26, 1924, a further sum of $4,033.76 was paid on said assessment by the crediting overassessments due and owing to plaintiff; and on January 27, 1927, $70,255.23 was abated on I. T. U. Schedule 2067.

IX

Of the amount of $85,186.71 shown on the supplemental return for the fiscal year ended June 30, 1918, as required by the Revenue Act of 1918, which was filed by the plaintiff on June 17, 1919, the sum of $31,462.86 was paid on June 17, 1919. On September 15, 1919 a claim for abatement of $53,824.85 was filed with the Collector of Internal Revenue at Louisville, Kentucky, and after the filing of said abatement claim neither defendant, nor any other person representing the United States Government took any steps whatsoever for the collection of said taxes covered by said abate-

ment claim, until on or about, to-wit, September 8, 1925, when said defendant collected of plaintiff the sum of $84,809.47 as set out in paragraph (10) hereof.

[fol. 24]

X

On or about September 8, 1925, the defendant collected from the plaintiff the sum of $84,809.47, all of which was paid under protest and duress, which consisted of $62,319.12 principal, and $22,409.35 interest, the amount of the principal sum having been previously assessed within the time required by law. No prior suit or proceeding had been begun before that time for the collection of said tax and interest or any part thereof.

XI

On, to-wit, September 30, 1925, the plaintiff duly filed a claim for refund for the sum of $84,809.51 in accordance with the provisions of law applicable thereto. No part of the said claim for refund has ever been allowed or rejected by the Commissioner of Internal Revenue or any other person.

XII

No part of the said sum of $84,809.47 has ever been paid to the plaintiff by the defendant or any one else, although demand for this amount has been made upon the defendant.

XIII

On or about December 13, 1923, the plaintiff signed and delivered to the Commissioner of Internal Revenue a waiver consenting to the extension of time for the assessment of any additional income or profits taxes which might be due for the fiscal year ended June 30, 1918, for a period of one year from the date said waiver was signed. No other waiver consenting to the extension of time for the assessment and/or collection of any additional income or profits taxes for the fiscal year ended June 30, 1918, was ever filed with the Commissioner of Internal Revenue by or on behalf of the plaintiff.

Miller & Chevalier, Attorneys for Plaintiff. Frank A. Ropke, Asst. U. S. Atty., Attorneys for Defendant.

[fol. 25] IN UNITED STATES DISTRICT COURT

OPINION—Rendered July 26, 1929

This is a suit to recover income and profits taxes for the fiscal year ended June 30, 1918, collected by duress from the plaintiff after the period of limitation for collection had expired. The facts are stipulated and the case has been submitted to the court for determination without the intervention of a jury. Briefly stated, the facts are these:

The plaintiff, a corporation, made its income tax returns on a fiscal year basis, its fiscal year ending on June 30th. In August, 1918, it made its income and profits tax return for the fiscal year ended June 30, 1918, and the amount shown to be due by that return, after the allowance by the Commissioner of certain abatements and after the crediting of certain overpayments on previous years, was paid and is not here in controversy.

Pursuant to the provisions of the Revenue Act of 1918, approved February 24, 1919, the plaintiff, on March 15, 1919, filed a tentative supplemental return for the fiscal year ended June 30, 1918, and on June 17, 1919, filed a complete supplemental return for the fiscal year ended June 30, 1918, showing an additional tax of $85,186.71 due for said fiscal year, and this amount was assessed by the Commissioner of Internal Revenue on September 12, 1919. On the August, 1919, assessment list the Commissioner of Internal Revenue assessed a further tax of $26,376.29 against the plaintiff for the same fiscal year. At the time the two supplemental returns were made the plaintiff paid in the aggregate, on account of additional tax shown to be due thereon, the sum of $49,344.88. On September 15, 1919, abatement claims in the respective amounts of $53,824.85 and $26,376.29 were filed. On December 13, 1923, plaintiff signed and delivered to the Commissioner of Internal Revenue a waiver, consenting to an extension of time for the assessment and collection of any additional income and profits taxes which might be due for the fiscal year ended June 30, 1918, for a period of one year from the date said waiver was signed.

No further steps were taken for the collection of the unpaid balance due on the assessment of September 12,

1919, or for the collection of the August, 1919, assessment until September 8, 1925, when the defendant collected from the plaintiff, under threat of distraint, the sum of $84,809.47. This sum represented the balance due on the two assessments of September 12, 1919, and August, 1919, and [fol. 26] interest. No suit or proceeding of any character had been begun prior to September 8, 1925, for the collection of said tax and interest, or any part thereof.

On September 30, 1925, plaintiff filed a claim for the refund of said sum of $84,809.47, and the Commissioner of Internal Revenue having failed to act on this claim within six months from the date of its filing, this suit was filed on April 14, 1927.

From the foregoing statement it is apparent that under the applicable limitation statutes, and giving full effect to the year's extension granted by the waiver signed December 13, 1923, the collection of this $84,809.47 became barred on December 13, 1924, and that on September 8, 1925, when same was collected, the defendant was without authority to enforce collection, either by distraint or suit. Bowen v. New York Albany Lighterage Co., 273 U. S. 346; Russell v. United States, 278 U. S. 181. This is admitted by the defendant, and, unless Section 611 of the Revenue Act of 1928 applies to the situation here, the plaintiff is entitled to recover. Section 611 of that act is as follows:

"If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an over-payment under the provisions of Section 607 relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 607 of the Act of 1928 provides:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto, shall

be considered an overpayment and shall be credited or refunded to the taxpayer, if claim therefor is filed within the period if limitation for filing such claim."

It is admitted in this case that the assessment was made prior to June 2, 1924, that a claim in abatement was filed, and that pending decision in the claim in abatement the [fol. 27] Collector made no attempt whatever to collect the tax assessed. The plaintiff contends, however, that the mere voluntary postponement by the Collector of collection of the tax assessed, pending decision on the claim in abatement, is not a stay of collection within the meaning of Section 611. It is insisted that the stay contemplated in that Section is a compulsory stay, such as was provided by Section 279 of the Revenue Act of 1924, which provided that a claim in abatement—

"—shall be accompanied by a bond in such amount not exceeding double the amount of the claim and with such surety as the Collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in Subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim."

Section 611, by its express terms, deals with taxes assessed under revenue acts in force prior to the effective date of the Revenue Act of 1924. Therefore, it seems to me that a review of the history of the use of claims in abatement under the Acts of 1916, 1917, 1918 and 1921, and the provisions of those acts in relation to such claims, and the regulations of the Treasury Department under which those acts were administered, will be helpful in arriving at the true meaning of Section 611. The Acts of 1916, 1917 and 1921 contain no provision whatever for the filing of claims in abatement, or for staying collection of the tax pending decision on claims in abatement, and the only provision with reference to claims in abatement contained in the 1918 Act is Paragraph 14 of Section 234, which authorized a taxpayer, at the time of filing his return for the taxable year 1918, to file a claim in abatement, based on the fact that he

had sustained a substantial loss arising from shrinkage in inventory value, &c. during such taxable year. This section further provides:

"In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, [fol. 28] with surety satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest."

Thus it will be observed that when the Act of 1928 was enacted the only statutory provision in any of the revenue acts affected by the provisions of Section 611 was the one contained in the Act of 1918, which specifically provided for the execution of a bond as a condition precedent for staying collection pending decision on a claim in abatement. It is apparent, however, that Section 611 is not restricted in its operation to the special claim in abatement and the stay of collection thereunder provided for in the Act of 1918, because Section 611, by its express terms, operates in those cases where the stay was granted without bond, as well as in those cases where it was granted with bond. While neither the Acts of 1916, 1917, 1921, nor the Act of 1918 except as hereinbefore pointed out, made any provision for the filing of claims in abatement, yet Section 3220 of the Revised Statutes, as amended and re-enacted by those acts, gave to the Commissioner ample authority to abate taxes illegally or erroneously assessed. Each of those acts gave to the Commissioner of Internal Revenue the authority, with the approval of the Secretary of the Treasury, to make rules and regulations for the enforcement of its provisions, and it is well settled that these rules and regulations, if not in conflict with the law, have the force and effect of law. By virtue of this authority Regulations 33 were promulgated for the administration of the Revenue Acts of 1916 and 1917, Regulations 45 for the administration of the Revenue Act of 1918, and Regulations 62 for the Act of 1921. Each of these regulations made specific provision for the filing of claims in abatement. In none of these regulations, however, was any provision made for the execution of bond, nor was there any manda-

tory provision that collection must be or must not be stayed pending decision on a claim in abatement. Each of these regulations however, contain a provision similar to that found in Article 1032 of Regulations 45, which declares:

"The filing of a claim in abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the Collector to exercise due diligence to prevent the collection of the tax being jeopardized. [fol. 29] He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

See: Article 261, Regulation 33; Article 1032, Regulations 45; Article 1032, Regulations 62.

It is thus clear that, inferentially, the regulations authorized the Collectors to postpone the collection of the tax pending decision on the claim in abatement, unless such postponement, in the judgment of the Collector, would jeopardize the collection of the amount finally determined to be due, and it is common knowledge that such was the usual practice. Sometimes a Collector would demand a bond as a consideration for postponement of collection; sometimes, when he had reason to doubt the solvency of a taxpayer, collection was immediately enforced; but, as a usual thing, if the Collector had no doubt of the solvency of the taxpayer, collection was withheld until final action on the claim.

It thus happened that in many cases arising under the Revenue Acts of 1916, 1917, 1918 and 1921 limitation had run against collection of the tax by the time the claim in abatement had been disposed of, and in those cases where bonds had not been exacted the taxpayer was resisting collection or paying under protest, on the claim that the tax was barred by limitation. Prior to the decision of the case of Bowen v. New York & Albany Lighterage Co., supra, those charged with the collection of income and profits taxes went on the assumption that the limitation provision of the respective acts did not apply to distraints. See—I. T. 1446, p. 218, Internal Revenue Cumulative Bulletin 1-2. This, no doubt, made the Collectors generally more willing

to postpone collection of an assessment pending decision on a claim in abatement that they otherwise would have been.

Following the decision of the Supreme Court in the case of Bowen v. New York & Albany Lighterage Company, a great many taxpayers who had failed to get relief on their claims in abatement, and who had paid their taxes under threat of distraint after limitation had run, were seeking to secure refunds, on the ground that collection had been forced from them illegally. This situation was at its height when Congress came to consider the enactment of the Revenue Act of 1928, and it was to prevent taxpayers taking advantage of the delay occasioned by their having filed claims in abatement that Section 611 was enacted. The purpose of Section 611 is very clearly portrayed in the ex- [fol. 30] planation of that section contained in the report of the Ways & Means Committee made when that Committee reported the bill to the House of Representatives. This report stated:

"Prior to the enactment of the Revenue Act of 1924, it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the Collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment. (Report No. 2, 70th Congress, 1st Session, p. 34.)"

Considering the language of Section 611 in connection with the provision of the Revenue Acts under which the assessments affected by that section were made, the regula- [fol. 31] tion and practice of the Treasury Department with reference to claims in abatement under those acts, and the purpose sought to be accomplished, as shown by the Committee Report, supra, there can not be any doubt that it was the purpose of Congress through this section to prohibit refunds being made from the Treasury in cases similar to the one at bar. There is no merit in the plaintiff's suggestion that Section 611 is only an inhibition against the Commissioner of Internal Revenue making refunds in such cases, but that it has no application in a suit against a Collector such as the one here. Such a construction of this section would lead to an unconscionable result. When he collected the tax, the Collector was required by law to immediately pay same into the Treasury. He had no right to retain the money pending the outcome of threatened litigation over the collection. The Government has had the benefit of the collection. Yet, if the plaintiff's theory is correct, Congress intentionally left Collectors open to suit and judgment in such cases as the one at bar, but denied them the right of reimbursement for any judgments thus obtained. It seems to me that the mere suggestion of the result of such a construction forces us to reject it.

I must therefore conclude that Section 611 was intended by Congress to take away from those taxpayers who had filed claims in abatement of assessments made prior to June 2, 1924, and who had, as the result of filing such claims, secured a postponement of payment pending decision on the claims, and who had been forced after the run-

ning of limitation to pay the tax thus assessed, the right to rely upon the fact that collection had been forced after the running of limitation as a basis for recovering a refund, whether the suit for such recovery is against the Collector who made same or directly against the United States. Having reached this conclusion, it remains to be determined if the statute so construed deprives plaintiff of its property rights, in violation of the Fifth Amendment to the Federal Constitution, as contended by the plaintiff.

It is well settled that no one has a vested right to rely upon a statute of limitation to defeat a debt or other personal obligation. The Legislature which gave the right may take it away, even after the bar has become complete. Campbell v. Holt, 115 U. S. 620. If this suit were turned around and were one by the United States against the plaintiff, to collect the tax involved here, the plaintiff certainly could not be heard to plead a statute of limitation [fol. 32] formerly in force but which had been repealed before the bringing of the suit, even though the bar under the former statute was complete prior to its repeal and prior to filing the suit. If a taxpayer has no vested interest in the defense of the statute of limitation, it is difficult to understand how he can have any vested interest in the right to recover taxes from the Collector, on the sole ground that payment was coerced after limitation had run. It seems to me that if his right to rely upon the statute as a defense may be destroyed by repeal or modification, his right to rely upon the statute as a basis for recovery may likewise be destroyed by repeal or modification. There can be no doubt that Congress had full power, immediately before the taxes were collected in this case, to have passed a law, denying to taxpayers situated as the plaintiff was the right to rely upon the statute of limitation, although the statute had run at the time of the passage of such law, Neither can there be any doubt of the soundness of the proposition that the Collector, in collecting taxes, acts as an agent of the United States. Furthermore, it is well settled that where an agent, without precedent authority, has exercised, in the name of a principal, a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act and thus retroactively give it validity, when rights of third persons have not inter-

vened. United States v. Heinszen & Co., 206 U. S. 370; Rafferty v. Smith Bell Co., 257 U. S. 226.

In this case we have the defendant, as Collector, acting as the agent of the United States. At a time when he was not authorized so to do, but at a time when the Congress of the United States had full authority to authorize him so to do, he collected, after limitation had run, the taxes involved in this case, and Congress had the power then and has had that power at all times since then to ratify the unauthorized collection, and that is what it did do, in effect, by the enactment of Section 611. It is true, when the plaintiff paid the taxes under duress, after the running of limitation, a right accrued to it to recover the taxes so paid, but that right was necessarily limited by the superior right of Congress to ratify the unauthorized collection.

As pointed out in the case of United States v. Heinszen, supra:

"To hold to the contrary would be to say that whilst the unauthorized act of an officer done on behalf of the United [fol. 33] States was subject to ratification by the United States, yet if the officer acted without authority, the act when performed annihilated the power to ratify; that is, that the very condition which engendered the power destroyed it."

The fact that plaintiff had brought suit on its claim prior to the enactment of Section 611 did not change the nature of plaintiff's right nor impair the paramount right of Congress to ratify.

In discussing how far the bringing of actions would operate to deprive the Government of the power to enact ratifying statutes which, if the action had not been brought, would have been valid, Cooley in his Constitutional Limitations (7th Ed. p. 543) says:

"Nor is it important in any of the cases to which we have referred that the legislative act which cures the irregularity, defect or want of original authority was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision."

This quotation was cited with approval in the Heinszen case, supra.

For the reasons stated, I am convinced that Section 611 controls the case at bar, and therefore plaintiff's petition will be dismissed and costs awarded to the defendant. A judgment conforming to the views herein expressed may be prepared by counsel and presented for entry.

July 26, 1929.

S. Lyman Barber and Miller & Chevalier, Louisville, Ky., Attorneys for Plaintiff. Frank A. Ropke, Asst. U. S. Atty., Louisville, Ky.; T. J. Sparks, U. S. Atty, Louisville, Ky.; C. M. Charest, General Counsel Bureau Internal Revenue, Washington, D. C., Attorneys for Defendant.

[fol. 34] IN UNITED STATES DISTRICT COURT

JUDGMENT AND FINDINGS OF FACT—Aug. 21, 1929

The above styled case having been submitted to the court upon pleadings and stipulation of facts and the court being advised in the premises is of the opinion for the reasons stated in the written opinion filed herein that plaintiff is not entitled to the relief sought and it is therefore ordered that plaintiff's petition be dismissed and held for naught, and that defendant recover of the plaintiff its costs herein expended, to which ruling of the court said plaintiff, by counsel, excepts and objects.

In reaching this conclusion, the court arrived at the following findings of fact:

I

That the plaintiff is a corporation duly organized and existing under and by authority of the laws of the state of Kentucky, and that said corporation filed its income tax returns on a fiscal year basis, its fiscal year ending on June 30th.

II

That the defendant has been since the 24th day of May, 1921 Collector of Internal Revenue for the collection dis-

trict of Kentucky, within the jurisdiction of this court, and that the tax sought to be recovered in this case was paid to said defendant as Collector of Internal Revenue.

III

That pursuant to the provisions of the revenue act of 1918, approved February 24, 1919, plaintiff filed tentative supplemental return for the fiscal year ended June 30, 1918, on March 15, 1919. On June 17, 1919, plaintiff filed a complete supplemental return for the fiscal year ended June 30, 1919, showing an additional tax of $85,186.71, due for said fiscal year, which said amount was assessed by the Commissioner of Internal Revenue on September 12, 1919. At the time the two supplemental returns were made, the plaintiff paid in the aggregate, on account of additional tax shown to be due thereon the sum of $49,344.88.

IV

That on August, 1919, assessment list the Commissioner of Internal Revenue assessed a further tax of $26,376.29 against the plaintiff for the same fiscal year.

[fol. 35]

V

On September 15, 1919, abatement claims in the respective amounts of $53,824.85 and $26,376.29 were filed.

VI

On December 13, 1923, plaintiff signed and delivered to the Commissioner of Internal Revenue a waiver consenting to an extension of time for the assessment and collection of any additional taxes which might be due for the fiscal year ended June 30, 1918 a period of one year from the date said waiver was signed.

VII

That no further steps were taken for the collection of the unpaid balance due on the assessment of September 12, 1919, or for the collection of the August, 1919, assessment until September 8, 1925, when the defendant collected from the plaintiff, under threat of distraint, the sum of

$84,809.47; this sum representing the balance due on the two assessments September 12, 1919, and August, 1919, plus interest.

VIII

No suit or proceeding of any character had been begun prior to September 8, 1925, for the collection of said tax and interest, for any part thereof.

IX

On September 30, 1925 the plaintiff filed a claim for the refund of said sum of $84,809.47, and the Commissioner of Internal Revenue failed to act on said claim within six months from the date of its filing, and this suit was filed on April 14, 1927.

August 21-1919.

[fol. 36] In United States District Court

Petition for Appeal—Filed Sept. 10, 1929.

To the Honorable Charles I. Dawson, District Judge:

The above named plaintiff, feeling aggrieved by the judgment rendered and entered in the above entitled cause on the twenty-first day of August, A. D., 1929, does hereby appeal from said judgment to the Circuit Court of Appeals for the Sixth Circuit for the reasons set forth in the Assignment of Errors, filed herewith, and prays that its appeal be allowed, and that citation be issued as provided by law, and that the transcript of record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth Circuit under the rules of said Court in such causes made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Ward Lovelace, S. Lyman Barber, Donald V. Hunter, Miller & Chevalier, 525 Marion E. Taylor Bldg., Lousiville, Kentucky. Attorneys for Petitioner.

In United States District Court

Assignment of Errors—Filed Sept. 10, 1929

Now comes the said plaintiff, and assigns errors in the decision of said District Court as follows:

1. The Court erred in holding that Section 611 of the Act of 1928 operated to deprive this plaintiff, of a right to recover from the defendant the sum of $84,809.47 with interest thereon.

[fol. 37] 2. The Court erred in failing to hold that Section 611 of the Revenue Act of 1928 had no application in the instant case in that the collection of taxes and interest to the amount of $84,809.47 was not "stayed" as by said Section required.

3. The Court erred in holding, in effect, that the illegal collection of the sum of $84,809.47 from the plaintiff, by the defendant, on September 8, 1925, did not give rise to a right of action in said plaintiff which it was beyond the power of Congress to confiscate or destroy.

4. The Court erred in failing to hold that the illegal collection by the defendant of the sum of $84,809.47 gave to the plaintiff a right of action which was property and which could not be taken away in violation of the provisions of the Constitution, by an Act of Congress purporting to bar recoveries in the Courts of amounts so illegally collected.

5. The Court erred in holding that Section 611 of the Revenue Act of 1928 was a ratification by the Congress of the illegal acts of the defendant, complained of in this suit, and that Congress had authority under the Constitution so to ratify.

6. The Court erred in failing to hold that the plaintiff was entitled to recover from the defendant the sum of $84,809.47 with interest and costs.

Wherefore, the plaintiff, Wright & Taylor, Incorporated, prays that the judgment of the District Court of the United States for Western District of Kentucky be reversed and that said District Court be directed to enter judgment for plaintiff.

Ward Loveless, S. Lyman Barber, Donald V. Hunter, Miller & Chevalier, 525 Marion E. Taylor Bldg., Louisville, Kentucky, attorneys for petitioner.

[fol. 38] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Sept. 10, 1929

This day came the plaintiff, Wright & Taylor, incorporated, and tendered its petition for appeal herein to the Circuit Court of Appeals for the Sixth Circuit, accompanied by its written assignment of errors, which are now ordered filed, and the court having considered same, it is ordered that said appeal to the Circuit Court of Appeals for the Sixth Circuit be and the same is hereby allowed, upon the plaintiff giving bond, as required by law, in the sum of $300.00.

September 10, 1929.

Citation in usual from showing service on Frank A. Ropke, omitted in printing.

[fols. 39 & 40] Bond on appeal for $300.00, approved September 17, 1929, omitted in printing.

[fol. 41] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD ON APPEAL

To the Clerk of the District Court:

You are requested to prepare and transmit to the Circuit Court of Appeals for the Sixth Circuit, in accordance with the rules of said Court, as a transcript of record upon the appeal heretofore allowed in the above entitled cause, the following:

1. Petition.
2. Amended Petition.
3. Answer.
4. Reply.
5. Stipulation of Facts.
6. Opinion of the Court.

7. Judgment of the Court.
8. Petition for Appeal.
9. Assignment of Errors.
10. Order allowing Appeal.
11. Citation on Appeal with proof of Service of Citation.
12. Bond for Costs.
13. This præcipe.

S. Lyman Barber, Ward Lovelace, Donald V. Hunter, Miller & Chevalier, 525 Marion E. Taylor Bldg., Louisville, Ky., Attorneys for Appellant.

Receipt of a copy of the foregoing præcipe this 17 day of A. D. 1929, is hereby acknowledged.

T. J. Sparks, Attorney for Appellee.

[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed October 8, 1929)

To the Honorable, The Clerk of the Court:

You will please enter the appearance of the undersigned as counsel for the appellant in the above entitled case.

S. Lyman Barber,
Donald V. Hunter,
Ward Loveless,

Of the Law Firm of
Miller & Chevalier,
525 *Marion E. Taylor Bldg.,*
Louisville, Kentucky.

APPEARANCE OF COUNSEL

(Filed December 30, 1929)

J. W. Menzies,
Clerk of said Court:

Please enter my appearance as Counsel for the Appellee.

Frank A. Ropke,
Asst. U. S. Attorney.

CAUSE ARGUED AND SUBMITTED

(March 12, 1930—Before: Denison, Moorman and Hicks, JJ.)

This cause is argued by D. V. Hunter for Appellant and by L. L. Gibson for Appellee and is submitted to the Court.

JUDGMENT

(Filed November 10, 1930)

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION

(Filed November 10, 1930)

Before DENISON, MOORMAN and HICKS, Circuit Judges.

HICKS, Circuit Judge: On March 15 and June 17, 1919, Wright & Taylor, Inc., appellant, filed supplemental income and profit tax returns for the fiscal year ending June 30, 1918. The Commissioner made assessments thereon and on Sept. 15, 1919, appellant filed abatement claims in the respective sums of $53,824.85 and $26,376.29. On Dec. 13, 1923, appellant executed a waiver extending for one year the time for the proper assessment and collection of the taxes. No further steps were taken by the Government or any of its agents for the collection of the taxes covered by the abatement claims until Sept. 8, 1925, when appellee collected under duress the sum of $84,809.47, the unpaid balance on the August and September 1919 assessments. This suit was brought to recover the amount so paid. Had the case been determined before the passage of the Revenue Act of 1928 appellant would have been entitled to judgment because

on Sept. 8, 1925, appellee had no authority to receive the money. The claim had been barred by the statute of limitations of five years found in Sec. 250 (d) of the Revenue Act of 1921 (*Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346) and the liability discharged (Sec. 1106 [a], Rev. Act of 1926, 44 Stat., Part 2, 113). The Bowers case not only prevented the collection of a large volume of taxes but subjected the Government to suit for amounts paid after the bar of the statute had fallen. To counteract this eventuality Congress incorporated in the Revenue Act of 1928 Sections 607,[1] 611,[2] and 612.[3] Sec. 612 broadly repealed Sec. 1106 (a),[4] supra. Sec. 607, in harmony with the Bowers case, provided that any tax paid after the expiration of the applicable limitation period shall be considered an overpayment and refundable if properly claimed, but Sec. 611 made an important exception. It provided that if the assessment was made before June 2, 1924, and if then a claim in abatement, with or without bond, was filed and if the collection of any part thereof was stayed then a payment made thereon after the expiration of the limitation period for collection shall not be considered as an overpayment under the provisions of Sec. 607.

---

[1] Revenue Act of 1928:

"Sec. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." 45 Stat. 874, 26 U. S. C. Sec. 2607.

[2] "Sec. 611. If any internal-revenue tax (or any interest, penalty, additional amount or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessments and collection." 45 Stat. 875, 26 U. S. C. 2611.

[3] "Sec. 612. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926." 45 Stat. 875.

[4] "Sec. 1106 (a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax." 44 Stat. 113, Part 2, 26 U. S. C., Sec. 1249.

Appellee filed his answer after the passage of the Revenue Act of 1928 and relied upon Sec. 611. Appellant's case falls within certain provisions of that section. The assessment against it was made within five years before June 2, 1924; appellant had filed an abatement claim and payment was made after the statute of limitations had run and before the passage of the Revenue Act of 1928. However, appellant insists that Sec. 611 has no application because (1) when read in connection with Sec. 607 it only prohibited the Commissioner from making refunds and did not affect a suit against the Collector to recover amounts already paid; (2) because the collection of the tax against it was not "stayed" in contemplation of Congress; or (3) if stayed, the stay was not caused by the abatement claims. Appellant further insists that the statute is unconstitutional because it undertakes to deprive the taxpayer of vested rights by reviving a barred liability.

The first contention is far-fetched. When Secs. 607, 611 and 612 are read together their evident purpose is to counteract the Bowers decision rendered Feb. 21, 1927, in all cases similar to that of appellant. These sections constitute a solemn legislative pronouncement that internal revenue collected from taxpayers in appellant's situation "shall not be considered as an overpayment * * *." It was intended to cut off any claim for the refund of such taxes at its very roots. If there was no "overpayment" it follows that nothing was due and there was therefore no cause of action. *Daniel Reeves, Inc.* v. *Anderson,* C. C. A. 2, decided July 21, 1930; *Oak Worsted Mills* v. *U. S.,* 36 Fed. (2) 529, 536 (C. of C.).

Nor can we narrow the phrase in Sec. 611, to wit, "and if the collection of any part thereof was stayed" to a situation where the Collector was barred or prevented from proceeding with the collection of such revenue. Such a situation is non-existent so far as our examination discloses. Upon the other hand it is settled governmental policy that the collection of taxes shall not be restrained by suit in any court. (R. S. 3234, U. S. C. Tit. 26, Sec. 154.) This is true even as to an alleged illegal assessment. *Graham* v. *DuPont,* 262 U. S. 234, 255; *Ellay Co.* v. *Bowers,* 25 Fed. (2) 637, C. C. A. 2.

In 1928 Congress faced a predicament. Prior to the Bowers decision it was generally assumed that there was no limitation upon the collection of revenue by distraint. There was therefore no absolute rule touching the suspension of collection pending decision upon a claim in abatement. In such a practical matter much was left to the discretion of the Collector. (See Art. 261, Tr. Reg. 33, Rev. Act of 1916 and 1917; Art. 1032, Reg. 45, Rev. Act. 1918; and Art. 1032, Reg. 62, Rev. Act 1921.) As a favor to taxpayers and to prevent the hardships incident to the payment of a tax before its final adjustment Collectors frequently voluntarily delayed collections pending settlement of abatement claims. This delay often extended beyond five years from the taxpayer's return. After the Bowers case the Government realized that what was meant as a gift of grace was in fact an effective weapon not only of defense but of offense and that by its use many taxpayers could not only prevent the collection of taxes but recover those already paid. Sec 611 was undoubtedly enacted to remedy this situation. (See Report No. 2 of the Ways & Means Committee to the House of Representatives, 70th Congress, 1st Session, p. 32; also Report of Senate Finance Committee No. 960, 70th Congress, 1st Session, p. 42; also Report of the House and Senate Conference Committee No. 1882, 70th Congress, 1st Session, pp. 22, 23.) *Goodcell* v. *Graham*, 35 Fed. (2) 586, C. C. A. 9; *Reeves, Inc.* v. *Anderson, supra.* Further, we think that this postponement of administrative action was caused by and incident to the abatement claims. It followed their presentation and the inference is that it resulted therefrom. The stipulation of facts does not indicate the contrary. The title of Sec. 611 is "Collection Stayed by Claim in Abatement."

Passing to the question of the constitutionality of Sec. 611, the crux of the whole matter is that appellant's cause of action depends upon whether it is absolutely free from revenue taxes for 1918. If so its immunity was acquired because it had taken advantage of governmental generosity extended under a mistake of law and not because the taxes were originally invalid. Whatever strength there may be in this position we do not regard it as proof against the taxing power of the Government. *Bill-*

ings v. *U. S.*, 232 U. S. 261, 283; *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 124. If as a result of the Bowers case the appellant was entitled to reimbursement it followed that appellant would escape its share of the common burden of taxation if the Government was without a remedy. We do not think appellant was immune from a corrective enactment or that such correction was tantamount to confiscation. We cannot believe that it acquired a vested right in the error of governmental agents or that the bar of the statute under such circumstances was equivalent to a tax receipt. The formula for the remedy is not important. It may have been by a repeal of the statute of limitations as in *Campbell* v. *Holt*, 115 U. S. 620, or by new legislative construction of an old statute, as in *Stockdale* v. *Atl. Ins. Co.*, 20 Wall. 323, or by the ratification of an unauthorized act as in *Heinszen & Co.*, 206 U. S. 37[illegible]r by any or all such combined. See also *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 231; *Huntley* v. *Gile*, 32 Fed. (2) 857, 859, C. C. A. 9; *Goodcell* v. *Graham, supra; Reeves, Inc.* v. *Anderson, supra.* In *United States* v. *Burden, Smith & Co.*, 33 Fed. (2) 229, C. C. A. 5, a different result was reached but that case was decided June 22, 1929. *Goodcell* v. *Graham, supra; Reeves, Inc.* v. *Anderson, supra; Oak Worsted Mills* v. *U. S., supra; 2nd National Bank* v. *U. S.*, 40 Fed. (2) 129 (C. of C.); as well as *Rockland & Rockford Line Corp'n* v. *Ham, Collector*, 38 Fed. (2) 239, and *American Glue Co.* v. *U. S.*, 42 Fed. (2) 235, from District Courts of the First Circuit, are all later and in accord with our views.

The judgment of the District Court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Wright & Taylor, Inc.* v. *Robert H. Lucas, Collector of Internal Revenue,* No. 5540, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 20th day of November, A. D. 1930.

J. W. MENZIES
[SEAL] Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 8, 1930.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,487. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 565. Wright & Taylor, Inc., petitioner, vs. Robert H. Lucas, Collector of Internal Revenue for the District of Kentucky. Petition for writ of certiorari and exhibit thereto. Filed November 28, 1930. File No. 35,487.

FILE COPY

Office Supreme Court
FILED
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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 565

WRIGHT & TAYLOR, INC., *Petitioner*,
vs.
ROBERT H. LUCAS, Collector of Internal Revenue for the District of Kentucky, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ——

WRIGHT & TAYLOR, INC., *Petitioner*,

vs.

ROBERT H. LUCAS, Collector of Internal Revenue for the District of Kentucky, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in the above case on November 10, 1930, (R. 44) affirming the decision of the United States District Court for the Western Dis-

trict of Kentucky 34 Fed. (2d) 328, (R. 34), and respectfully shows to this honorable Court:

STATEMENT

This case involves the interpretation and constitutionality of Section 611, of the Federal Revenue Act of 1928, c. 852, 45 Stat. 791, 875.

In this case certain income taxes were collected under duress and protest after such collection was barred by limitation. Suit to recover the tax so illegally collected was duly instituted against the respondent Collector before the enactment of Section 611, Revenue Act of 1928. When such suit was instituted, petitioner had a right to recover against which the respondent had no defense. Unless the above-named section, which the Government now relies on as a defense, was intended to furnish a new defense, available even in pending suits against collectors, the petitioner was entitled to judgment. The claims in abatement alleged by the respondent to have "stayed" collection were filed more than five years before the statute of limitations expired. The respondent claims that Section 611 is to be construed as affording a defense available to the respondent herein; petitioner opposes this, asserting (a) the facts in this case do not support the Government's affirmative plea that the claims in abatement were what "stayed" collection, (b) the restriction of Section 611 was intended merely to affect refunds and credits of tax made in ordinary course by administrative officials under the provisions of law authorizing such administrative action (notably Section 607 of the Revenue Act of 1928) and does not establish a defense available in court, especially where a taxpayer sues a collector at common law to recover

taxes forcibly collected contrary to a statute of limitations, (c) Section 611 is not retroactive; if it is thought to be retroactive in any degree, it is so only as to voluntary payments of barred taxes and not as to compulsory payments, (d) if Section 611 is construed as intending to revive a tax liability which is not only barred but discharged by express provision of law, Section 611 is to that extent invalid as contravening the Fifth Amendment of the Constitution.

The facts were stipulated (R. 22) and were specially found by the District Court (R. 34). The petitioner on June 17, 1919, made its income tax return for the fiscal year ended June 30, 1918 (R. 22) and, upon the assessment of the tax shown to be due and of an additional tax, disputed the correctness of the assessments by filing claims in abatement on September 15, 1919 (R. 23). On December 13, 1923, the petitioner filed a "waiver" which had the effect of extending the five year statutory period for collection of this tax from June 17, 1924, to December 13, 1924, (R. 24). Neither the Commissioner nor the respondent took any steps toward collecting the unpaid assessments until September 8, 1925, when the respondent by threats of distraint forced the petitioner to pay the taxes assessed against it (R. 23, 24).

On September 30, 1925, the petitioner filed a claim for refund of the taxes so collected (R. 24) contesting the amount of the tax on the merits and on the further ground that the statutory period for collection had expired (R. 6-7). No action being taken by the Commissioner upon this refund claim, a suit was filed on April 14, 1927, in the District Court for the Western District of Kentucky (R. 1) in which the dispute as to the merits of the tax was abandoned because the

taxes had been illegally collected after the statutory period prescribed therefor (R. 1-5, 8-9) and this ground was sufficient to sustain the action. The respondent failed to answer until April 8, 1929, (R. 17) at which time he raised the defense that Section 611 of the Revenue Act of 1928 barred recovery. This contention was sustained by the District Court (R. 25) in an opinion rendered July 26, 1929, 34 Fed. (2d) 328.

The Circuit Court of Appeals in affirming the District Court recognized in its opinion (R. 44) that, had the case been decided prior to the passage of the Revenue Act of 1928, the petitioner would have been entitled to judgment against the respondent who had no authority to receive the money at the time of collection, the tax claimed having been barred by the statute of limitations of five years, found in Section 250(d) of the Revenue Act of 1921, and the liability discharged, citing Section 1106 (a), of the Revenue Act of 1926, 44 Stat. Part 2, 113. The court concluded, however, that Section 607, 611 and 612, of the Revenue Act of 1928, gave the respondent a valid defense and entered judgment (R. 44) affirming the decision of the District Court.

STATUTES INVOLVED

Sections 607, 611 and 612, of the Revenue Act of 1928, provide:

> "SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be consid-

ered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Sec. 607 relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

QUESTIONS INVOLVED

The case involves the following questions:

(a) Whether the facts in this case support respondent's plea that collection was stayed by claim in abatement, within Section 611, Revenue Act of 1928.

(b) Whether the effect of Section 611, like Section 607 of the same law, was merely to prevent administrative authorities from making refunds and credits in ordinary course under the provisions covering such administrative acts, or whether it was also intended to furnish a defense in law suits, even suits against collectors.

(c) Whether Section 611 was intended to be retroactive in effect and, if so, whether it was intended to bar recoveries in cases other than those where pay-

ments were voluntarily made after the statutory period for collection.

(d) If Section 611 was intended to bar recoveries by suit in court in cases similar to the present, does the section to that extent violate the Fifth Amendment?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the court below is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States v. Burden, Smith & Company,* 33 Fed. (2d) 229, and was recognized so to be in the opinion below (R. 48).

2. The decision of the court below is also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Heiner v. Erie Coal & Coke Company,* 42 Fed. (2d) 214, now pending in this Court on certiorari, No. 508, October Term 1930.

3. The case involves important questions which have not been and should be settled by this Court. These questions are of great public interest and have arisen in many jurisdictions, resulting in a hopeless conflict of judicial opinion.

4. Unless the writ is granted herein the rights of this petitioner cannot be preserved pending decisions of this Court as to the meaning and validity of Section 611 in other cases, now pending, in which this Court has granted writs of certiorari.

The Court has granted writs of certiorari in the case of *Graham & Foster, Co-partners etc. v. Goodcell, Collector,* No. 36, October Term, 1930, certiorari granted March 3, 1930; *Magee v. United States,* No. 65, October Term 1930, certiorari granted May 19, 1930; *Oak Worsted Mills v. United States,* No. 104, October Term

1930, certiorari granted June 2, 1930; *Taft Woolen Company v. United States,* No. 105, October Term 1930, certiorari granted June 2, 1930; and a number of other cases involving Section 611. None of the cases involving Section 611, in which certiorari has been granted, appear to raise questions which are in this case as to the effect of a waiver as a stay of collection in a case where illegal collection was had without the prior rejection of an abatement claim. Since, therefore, decisions in those cases will not necessarily decide all the issues raised in this case, the petitioner respectfully requests that, in the event this petition is granted, the case be advanced to be heard with the other cases involving Section 611, in order that the effect of Section 611, in cases such as this, may be considered by the Court in reaching its decision on the scope and validity of said Section.

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit in the case numbered on its docket No. 5540, *Wright & Taylor, Inc. v. Robert H. Lucas, Collector of Internal Revenue for the District of Kentucky,* be granted; that the said decision be reversed and that this petitioner have such other and further relief as may be its right under the law.

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals (R. 44-48), rendered November 10, 1930, has not as yet been reported. The opinion of the United States District Court (R. 25-33) is reported in 34 Fed. (2d) 328.

JURISDICTION

The decision of the Circuit Court of Appeals for the Sixth Circuit, the review of which is sought, was entered on November 10, 1930 (R. 44). Jurisdiction for the issuance of the writ is granted in Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

STATEMENT OF THE CASE

The facts have been set forth in the petition. They show that respondent forced petitioner to pay money as taxes at a time when respondent had no right to collect the money, because the tax claim had been barred by the running of a period of time prescribed in the revenue law for collection of the taxes, and the liability for the taxes had been discharged. Petitioner sued respondent in April, 1927, to recover the money illegally exacted from it by the respondent, and was concededly entitled to judgment until May 29, 1928, when the Revenue Act of 1928 was approved. The court below held that, because petitioner had applied for the abatement of the taxes assessed against it, Section 611, of the Revenue Act of 1928, took away petitioner's right of recovery.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that Section 611 of the Revenue Act of 1928 applies to the facts in this case, notwithstanding the absence of any showing that the claims in abatement were influential in staying the Collector from enforcing payment.

2. In holding that Section 611 applies not only to purely administrative credits and refunds of the type mentioned in Section 607, but that it was also intended to furnish a defense in law suits against Collectors.

3. In holding that Section 611 is to be given retroactive effect, and in not holding that the retroactive effect, if any, is limited to voluntary payments of barred tax.

4. In holding that Section 611 shows an intention to revive a tax liability expressly discharged by law (in addition to being merely barred) and that, so construed, there is no violation of the Fifth Amendment to the Constitution.

5. In affirming the decision of the District Court, and failing to direct that judgment be entered for this petitioner.

ARGUMENT

Section 607 and Section 611 of the Revenue Act of 1928 are quoted in the petition.

1. Collection is not "stayed" unless some circumstances, legally or morally, tie the hands of the Collector, and the mere fact that abatement claims were filed does not show that collection was "stayed by" such filing (*United States v. Burden, Smith & Company*, 33 Fed. (2d) 229, conflicting with the decision

below). The respondent pleaded such a stay in this case but the facts do not show it. A claim in abatement is not a request for delay but merely asks (immediate) cancellation of the assessment. Regulations provide that the filing of a claim in abatement does not necessarily operate as a suspension of collection. Article 1032, Regulations 45 and Regulations 62. In this case the claims in abatement were filed more than five years before the collection became barred; a waiver was filed in December, 1923, extending the time for collection until December, 1924, but collection was not made until about a year after the waiver expired.

Having interposed an affirmative defense, the respondent had the burden of showing all the facts necessary to support it, especially since the facts as to the cause for delay in collection were peculiarly within the knowledge of the respondent. The Court below was not justified in presuming that the filing of the claims in abatement, rather than mere inaction, or other causes, was responsible for the five years' delay.

Since the petitioner's waiver put the respondent on notice to collect, it is not reasonable to suppose that his delay thereafter was due to the abatement claim. Indeed, since the waiver was against petitioner's interest, the reasonable presumption is that respondent demanded a waiver and elected to collect within the period specified therein. Section 611 was not intended to apply to cases of that character. House Report No. 2, 70th Congress, First Session, p. 34.

2. The court below concluded that Sections 607, 611 and 612, of the Revenue Act of 1928, were enacted in

order to relieve against the effect of the decision of this Court in *Bowers v. New York and Albany Lighterage Company,* 273 U. S. 346, and were intended to prohibit not only administrative refunds but recoveries in the courts. In this the court erred since only Section 611 has any relation to claims resulting from the decision in *Bowers v. New York and Albany Lighterage Company,* and said Section has no effect other than to prescribe that the illegal collection of assessed taxes under certain prescribed conditions "shall not be considered as an overpayment under the provisions of Section 607." Clearly, therefore, unless Section 607 reaches suits for repayments which were pending in the courts when the Revenue Act of 19.8 was approved, Section 611 can have no application thereto.

In *Heiner v. Erie Coal & Coke Company,* 42 Fed. (2d) 214, certiorari granted 1930, No. 508, October Term 1930, it was held that these sections were not intended to operate as a defense in suits against collectors.

Section 1106 (a), of the 1926 Act, seemingly prohibited refunds and credits of taxes illegally collected after the statutory period therefor unless the tax had been overpaid, in the sense of never having been due. This Section, upon representations of the Government, was held by the courts to apply only to administrative refunds or credits and to have no effect as a bar to recoveries in the courts even though the illegal collections were not "overpayments." *Ellay Company v. Bowers,* 25 Fed. (2d) 637, certiorari denied 48 Sup. Ct. 601, *Thornhill Wagon Company v. Noel,* 17 Fed. (2d) 407, *Gove v. Nichols,* 23 Fed. (2d) 856. Section 612, of the Revenue Act of 1928, repealed Section 1106 (a), of the 1926 Act, and Section 607 provided that barred

collections should be *considered* overpayments and should be credited or refunded to taxpayers. It thus seems apparent that the sole purpose and effect of this Section was to authorize administrative action formerly prohibited by Section 1106 (a). It would follow that Section 607, like the Section which it superseded, was not intended to relate to recoveries in the courts.

The court below, in emphasizing that Section 611 provides that illegal "collections" in certain cases should not be considered "overpayments" and in reasoning that if there was no overpayment there could be no recovery, apparently lost sight of the fact that it is illegal collections, not "overpayments" in fact which are recoverable in the courts. *Graham v. Dupont*, 262 U. S. 234, *Bowers v. New York and Albany Lighterage Company*, supra, *Toxaway Mills v. United States*, 61 Ct. Cls. 363, reversed 273 U. S. 781, upon confession of error by the Solicitor General.

3. If Section 611 is to be given retroactive effect, it must be separated from Section 607, since that Section is plainly prospective in its provisions. Taken together, the two Sections seem to provide merely that if a claim for refund is filed, based upon Section 607, a credit or refund shall be allowed by the administrative authorities unless a situation described in Section 611 is found to exist, in which event the claim is to be disallowed. The claim for refund in the case at bar was filed, and this suit was brought long prior to the enactment of Sections 607 and 611, and nothing appears in either of these Sections which indicates a purpose to render these earlier proceedings in court of no effect.

The facts in the case at bar illustrate results from giving Section 611 retroactive effect, which strongly suggest that Congress did not intend that this Section should operate retroactively. Petitioner disputed the correctness of the Commissioner's assessments and filed claims in abatement (R. 23). The assessments were collected without final action on these claims (R. 23), and the issues were kept alive by a claim for refund (R. 6-7, 24). No action was taken on this claim and this suit was brought (R. 35). Quite apart from the merits of the assessments, it was recognized at the time of collection that the tax liability had been discharged by the expiration of the statutory period for collection, and that a right to recover for that reason existed. Under these circumstances petitioner was justified in basing its suit solely upon the fact that collection was had after the statutory period therefor (R. 1-9), since that fact rendered moot the issues formerly raised as to the correctness of the assessments.

It would seem plain that Section 611 was not intended to penalize the abandonment of issues as to the merits of the tax, such abandonment having been safe and proper when made.

If Section 611 was intended to have any retroactive effect it seems most reasonable to conclude that it was meant to apply in cases of voluntary payments made after the statutory period for collection, but not to cases where taxpayers did not share the erroneous belief of collectors, that there was no statutory limitation upon the time for collections by distraint, and resisted collection. The Section refers to *payments* instead of collections, and has been construed by the Commissioner as relating only to voluntary payments made

after its enactment. (Instructions to Collectors, Mim. 3660, Cumulative Bulletin VII-2, p. 82). If it so operates as to cases arising after its enactment, it ought to have the same meaning when applied retroactively.

If Section 611 applies only to voluntary payments, the results of the mutual mistake of law of taxpayer and collector may fairly be permitted to stand, and the Government would have relief against claims raised for the first time after the decision in *Bowers v. New York and Albany Lighterage Company*, supra. This relief should be substantial since the court below stated in its opinion (R. 47) that "Prior to the Bowers decision it was generally assumed that there was no limitation upon the collection of revenue by distraint."

(4) The court below erred in concluding that Congress in enacting Sections 607, 611 and 612 of the Revenue Act of 1928 intended to revive previously discharged liabilities for taxes and in concluding that such a result was within the power of Congress. The court's construction of the law conflicts with the decision of the Court of Appeals for the Third Circuit in *Heiner v. Erie Coal & Coke Company*, 42 Fed. (2d) 214, certiorari granted 1930, No. 508, October Term, 1930.

The limited scope of these three Sections has been heretofore pointed out herein. Certainly their express terms show no purpose to (a) repeal an existing statute of limitations, (b) give new legislative construction to an old statute, or (c) ratify illegal collections or otherwise to re-create liabilities, as the court below found was their effect.

The court below recognizes that failure of the respondent to collect within the period prescribed by the statute not only barred the remedy but discharged the

liability (Opinion R. 45). Section 1106 (a), of the Revenue Act of 1926, is cited. This Section was merely declaratory of the pre-existing law, and was enacted to settle doubts raised by the decision of the Court of Claims in *Toxaway Mills v. United States*, supra. (See House Report No. 356, p. 55, 69th Congress, First Session). The repeal of Section 1106 (a) by Section 612, of the Revenue Act of 1928, would not, therefore, operate to revive liabilities discharged or extinguished prior to the passage of the 1928 Act.

The suit in the case at bar is an action under the common law against the respondent in his individual capacity. *Smietanka v. Indiana Steel Company*, 257 U. S. 1, *Levy v. Wardell*, 258 U. S. 542. The action retains its common law basis, notwithstanding that the revenue laws prescribe conditions precedent to suit, and notwithstanding that, after judgment, the liability may be transferred to the United States. *Patton v. Brady*, 184 U. S. 608, *Sage v. United States*, 250 U. S. 33.

As thus viewed, the effect given to Section 611 by the court below is to destroy a right of action which petitioner had against the respondent as an individual. This plainly would be the taking of property without due process of law, and prohibited to the Congress by the Fifth Amendment. This Court has recognized that statutes having the effect of reviving or re-creating liabilities which have become extinguished through lapse of time violate the Fifth Amendment. *Danzer v. Gulf and Ship Island R. R. Company*, 268 U. S. 633, 636, *Davis v. Mills*, 194 U. S. 451.

If it be considered that the subject matter of the suit is primarily Federal taxes, and that Congress has the power to defeat recovery by ratifying the illegal col-

lection by the respondent, as in *United States v. Heinszen*, 206 U. S. 370, examination will show that Congress has not expressly ratified these illegal collections by any provisions of the Revenue Act of 1928. Express ratification has been held by this Court to be essential in other situations where illegal collections of taxes have been made. *United States v. Heinszen*, supra, *Lincoln v. United States*, 197 U. S. 419, and *De Lima v. Bidwell*, 182 U. S. 1.

It would seem that the most that can be said of Section 611 is that it directed the retention by the United States of moneys collected as taxes after liability therefor had become extinguished. This seems more nearly a direction to confiscate private property than the revival of a tax. Its non-taxing and confiscatory character more clearly appears if analysis is made of the cases in which citizens occupying positions essentially identical with this petitioner, are permitted to escape the liability found, by the court below, to have been created or revived by Section 611.

(a) Section 611 does not authorize the retention by the Government of moneys illegally collected where collection was stayed by claims for credit. (G. C. M. 6296—Cumulative Bulletin VIII 2, p. 152.)

(b) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the Revenue Act of 1928. (I. T. 3660—Cumulative Bulletin VII-2, p. 82.)

(c) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the

Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(d))Section 611 does not authorize collection to be made from those who stayed collection by claims in abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period therefor.

(5) It is, therefore, respectfully urged that the Circuit Court of Appeals for the Sixth Circuit erred in affirming and not reversing the decision of the District Court below.

Respectfully submitted,

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 565.

WRIGHT & TAYLOR, INC., *Petitioner,*

vs.

ROBERT H. LUCAS, Collector of Internal Revenue for the District of Kentucky, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

DONALD V. HUNTER,
ROBERT N. MILLER,
S. LYMAN BARBER,
Counsel for Petitioner.

922 Southern Building.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the United States Circuit Court of Appeals (R. '42) was filed November 10, 1930, and

has not as yet been reported. The opinion of the United States District Court for the Western District of Kentucky (R. 42) is reported in 34 Fed. (2d) 328.

Jurisdiction.

The judgment of the Court of Appeals for the Sixth Circuit was filed on November 10, 1930 (R. 25). A petition for the writ of certiorari to review this judgment was filed on November 28, 1930, and was granted on December 8, 1930, under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. 43 Stat. 938.

Questions Presented.

This case presents the question whether the facts in this case bring it within the terms of Section 611 of the Revenue Act of 1928, whether that Section was available to the respondent as a defense to petitioner's suit, and whether said Section, if intended to apply to cases such as the case at bar, violates the Fifth Amendment to the Constitution of the United States.

Statutes Involved.

Sections 607, 611 and 612, of the Revenue Act of 1928, C. 852, 45 Stat. 791, provide as follows:

> "SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an over-

payment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Sec. 607 relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

Statement of the Facts.

The facts were stipulated (R. 21-24) and were specially found by the District Court (R. 34, 36). They show that the petitioner on June 17, 1919, made its income tax return for the fiscal year ended June 30, 1918 (R. 22), and, upon the assessment of the tax shown to be due and of an additional tax, disputed the correctness of the assessments by filing claims in abatement on September 15, 1919 (R. 23). On December 13, 1923, the petitioner filed a "waiver" which had the effect of extending the five year statutory period for collection* of this tax from June 17, 1924, to December 13, 1924 (R. 24). Neither the Commissioner nor the

*While the stipulation says that the "waiver" was of limitations on assessment, it was set out and admitted in the pleadings that the waiver also referred to collections as well as assessments (R. 3, 19), and was found so to be by the trial court, Finding of fact V (R. 35).

respondent took any steps toward collecting the unpaid assessments until September 8, 1925, when the respondent by threats of distraint forced the petitioner to pay the taxes assessed against it (R. 24).

On September 30, 1925, the petitioner filed a claim for refund of the taxes so collected (R. 24) contesting the amount of the tax on the merits, and on the further ground that the statutory period for collection had expired (R. 5-7). No action being taken by the Commissioner upon this refund claim, a suit was filed on April 14, 1927, in the District Court for the Western District of Kentucky (R. 1) in which the dispute as to the merits of the tax was abandoned and the suit was based on the broad ground that taxes had been illegally collected after the statutory period prescribed therefor (R. 1-4, 8-10) and this ground was sufficient to sustain the action. The respondent failed to answer until April 8, 1929 (R. 16-20) at which time he raised the defense that Section 611 of the Revenue Act of 1928 barred recovery. (R. 20) This contention was sustained by the District Court (R. 25) is an opinion rendered July 26, 1929, 34 Fed. (2d) 328.

The Circuit Court of Appeals in affirming the District Court recognized in its opinion (R. 42) that, had the case been decided prior to the passage of the Revenue Act of 1928, the petitioner would have been entitled to judgment against the respondent who had no authority to receive the money at the time of collection, the tax claimed having been barred by the statute of limitations of five years, found in Section 250(d) of the Revenue Act of 1921, and the liability discharged, citing Section 1106 (a), of the Revenue Act of 1926, 44 Stat. Part 2, 113. The Court concluded, however, that Section 607, 611 and 612, of

the Revenue Act of 1928, gave the respondent a valid defense and entered judgment (R. 42) affirming the decision of the District Court.

Specification of Errors.

The following errors were specified in the petition. The court erred:

1. In holding that Section 611 of the Revenue Act of 1928 applies to the facts in this case, notwithstanding the absence of any showing that the claims in abatement were influential in staying the Collector from enforcing payment.

2. In holding that Section 611 applies not only to purely administrative credits and refunds of the type mentioned in Section 607, but that it was also intended to furnish a defense in law suits against Collectors.

3. In holding that Section 611 is to be given retroactive affect, and is not holding that the retroactive effect, if any, is limited to voluntary payments of barred tax.

4. In holding that Section 611 shows an intention to revive a tax liability expressly discharged by law (in addition to being merely barred) and that, so construed, there is no violation of the Fifth Amendment to the Constitution.

5. In affirming the decision of the District Court and failing to direct that judgment be entered for this petitioner.

Summary of Argument.

Section 611 applies only to cases where collection has been stayed by abatement claims. The pleadings in the case raise the issue whether petitioner's abatement claims had any relation to the delay in collection. No proof of such relationship was made to sustain the respondent's burden of proving the truth of his affirmative plea. A waiver was given, which put the Collector on notice to collect, and precluded any inference that further delay was due to the abatement claims.

Section 611 is, by its terms, dependent for effect upon Section 607 of the same Act, and, since Section 607 is plainly limited to administrative action, the subsidiary section should have the same effect. In referring to "overpayments" neither of these sections meant to bar recoveries in the courts. This is shown by the reasons which actuated the reference to overpayments.

These sections by their terms show no purpose to affect a taxpayer's right to recover collections illegally enforced prior to their enactment, and ought not to be construed to have that effect.

When taxes have been barred by limitation they become extinguished. The effect given to the section by the court below is to recreate liabilities already discharged, or to confiscate money of the taxpayer which chanced to be in the Government's possession when these sections were enacted. Either of these actions would be beyond the power of Congress. If so construed, the section also involves unreasonable classification, so as to violate the Constitution.

Argument.

The general policy of the recent revenue acts is that after a certain fixed time taxpayers shall be safe from tax demands. In the case at bar collection was had after the limitation period prescribed therefor (section 250 (d) Revenue Act of 1921), and the courts below recognized that prior to the enactment of section 611 of the Revenue Act of 1928 this petitioner had the right to recover the amounts exacted from it.

Section 611 provides for an exception to the general limitation policy. The parties differ as to how radical that exception was meant to be. Payments by taxpayers after the statute has run in the taxpayer's favor fall into two classes, (1) those where the taxpayer voluntarily complies with the collector's belated request or demand and (2) cases where the taxpayer complies with a belated demand only when compelled to do so by duress. The Government, claiming that the exception goes to the full length of affecting both of these classes of payments, is in the position of contending that where a collector has disobeyed the law which forbade him to collect and has enforced payment from a taxpayer who was insisting on his rights, the taxpayer was intended to be without any redress if it happened that, in contesting the accuracy of the Government's figures he happened to choose the method of filing a claim in abatement, and if, in the natural course, such filing caused a stay of collection. The Government thus claims that as regards a particular class of taxpayers, whose procedure was not only legal when adopted but was actually invited by the Government's own regulations, Congress intended them to be without redress after

the collector's illegal act. We submit that the words of the section do not support that extreme contention.

I.

There was no evidence to support the respondent's affirmative plea that collection was stayed.

Section 611 was improperly applied to this case (A) because there was no evidence to support respondents' affirmative plea that collection was stayed, even if it be conceded that cases of voluntary administrative delay involve a stayed collection, and (B) because Section 611 contemplates some act of a taxpayer which legally or morally tied the hands of the respondent, and nothing which petitioner did had this effect.

(A)—Section 611, the title of which is "Collection Stayed *By* Claim in Abatement", applies here only:

> " * * * if a claim in abatement was filed, with or without bond, and if the payment of any part thereof was stayed * * * "

The respondent, by an affirmative plea (R. 20) asserted in the trial court that that petitioner, by filing claims in abatement, stayed collection of the taxes assessed against it. Petitioner denied this averment (R. 21).

The facts, which were stipulatted (R. 21), showed only that in June, 1919, petitioner filed its final return for the fiscal year ended June 30, 1918; that the tax shown thereon to be due, and additional taxes, were assessed against it in August and September, 1919; that on December 13, 1923, which was within seven months of the end of the limitation period for collec-

tion (June 17, 1924), petitioner filed a "waiver" extending the time for assessment and collection to December 13, 1924, and that no steps toward collection were taken until September 8, 1925, when collection was enforced by duress. We submit that this inference was unwarranted, as a matter of law. Since the collection did not follow rejection or other disposal of petitioner's claims in abatement, and since the waiver put a definite limit upon the time for collection, any failure to act within the period was chargeable to the respondent rather than to any act of the petitioner, unless, as does not appear, some further inducement to delay was given.

the court inferred from these facts that collection had been stayed by the claims.

The Court seems to have assumed that, since it was the duty of the respondent to collect promptly, it is to be inferred that the specific cause of his failure was the abatement claims.

The claims were filed almost six years before collection was had, and, so far as appears, were unacted upon. Under these circumstances any relationship between the claims and the delayed collection can be arrived at only by supposition, and by disregarding the possibility that the delay in collection was due to mere oversight.

However, even if it be assumed that the respondent delayed collection after the abatement claims were filed, in order to permit action thereon, the filing of the waiver changed the situation. The effect of the waiver was to extend the time for collection. However, it did more. It was filed by the petitioner and must have shown a purpose upon its part to set a limit upon the period of delay in collection which it was seeking, or expected to receive. Any delay in collection thereafter, was more than was asked for, and should not now work harm to the petitioner.

With the period of limitations about to expire, the waiver was against the petitioner's interest, unless demanded as a condition to a further delay in collection. If the waiver was so demanded, it showed an election upon the part of the collector not to rely on the claims in abatement as a reason for not collecting. The respondent's failure to act within the time specified in the waiver, cannot be charged in any wise against the petitioner. The case is one of thousands in which collectors have not shown diligence.

The respondent Collector, rather than the petitioner, possessed the records and other information showing why the delay occurred, and suffers no hardship if required to prove that, of possible causes, the real cause was the abatement claims.

The express terms of Section 611 seem to require something more than a mere inference that a delay which followed the filing of a claim in abatement was due to or induced by such claim. Section 611, by its terms, relates only to cases where collection has been delayed until after the statutory period prescribed therefor. If, therefore, Congress had intended the presumption indulged in the case at bar, or if, as the Government contends in its brief in the case of *Graham & Foster v. Goodcell,* certiorari granted, Number 36, this Term (at page 21), Congress "knew the situation and legislated with reference to that situation," thereby rendering affirmative proof unnecessary, we submit that Congress would have inserted in the statute only the first of the two additional conditions prescribed. The two conditions limiting the application of Section 611 are "if a claim in abatement was filed *and if the collection of any part thereof was stayed.*" The decision below

and the interpretation urged by the Government would render the final condition surplusage.

(B)—We further submit that the term "stayed" as used in Section 611 contemplated something which either legally or morally tied the hands of the respondent, as was held in *United States v. Burden Smith and Co.*, 33 Fed. (2d) 229. Since nothing which petitioner did had such effect, the decision below was erroneous. The instances in which the word "stay" has been in reference to collections of income taxes, and cases where undertakings, other than bonds, have stayed collection, in connection with abatement claims, have been pointed out in other briefs now before this Court, and will not be here repeated. This is more fully stated in the brief of Counsel herein, as *amici curiae*, in *Graham and Foster v. Goodcell* (No. 36, present term), pages 5 and 6, also in the brief for petitioner in *Roy & Titcomb Inc. v. United States* (No. 412—this term), pages 37-41.

II.

Section 611 was not intended to apply to cases, such as the case at bar, where suit was pending before the Revenue Act of 1928 was enacted.

If Section 611 is to be given retroactive effect, it must be considered as operating more broadly than Section 607, of which it is, by its terms, merely a subsidiary. Section 607 provides that taxes which have been illegally collected, after the period of limitations:

> "*Shall* be considered an overpayment and *shall* be credited or refunded to the taxpayer, if claim therefor *is* filed within the period of limitations for filing such claim."

Section 611 provides that the payment made in the circumstances described therein

> "shall not be considered as an overpayment under the provisions of Section 607."

Taken together the two sections seem to provide merely that if a claim for refund is filed, based upon Section 607 (and hence is filed after the approval of the 1928 Act), such claim shall be allowed by the administrative authorities unless a situation described in Section 611 is found to exist, in which event the claim is to be disallowed.

However, even if, as is contended by the Government, the language employed in Section 607 relates to status and not to time, we submit that the facts in this case illustrate results of the sweeping application given by the courts below, which Congress did not intend Section 611 to produce.

Petitioner disputed the correctness of the Commissioner's assessments by filing claims in abatement (R. 23). The assessments were collected without disposal of these claims. A claim for refund was filed on the primary ground that collection was barred and illegal when had (R. 6-7, 24). Another ground was that the tax was not due. The Commissioner ignored the refund claim, and when time came to file suit, the issue as to the merits of the tax, which had never been decided, was abandoned, and suit was brought claiming a recovery on the then sufficient ground that collection was had after the tax had become barred (R. 1-4).

It would seem plain that Section 611 was not intended to penalize the abandonment of issues regard-

ing the merits of the tax, such abandonment having been safe and proper when made.

If Section 611 was intended to have any retroactive effect, we submit that it does not extend to cases such as this, where payment was forced, and especially where, as here, the taxpayers had taken steps to reclaim enforced payments of barred taxes long prior to the decision in the case of *Bowers* v. *New York and Albany Lighterage Company*, 273 U. S. 346, a case said by the Court below to have caused the enactment of Section 611.

While Section 611 refers to payments of barred taxes, whether made before or within one year after its enactment, the section does not specify whether the term "payment" includes enforced as well as voluntary payments. However, the section as originally drawn specifically authorized collection by distraint or suit, if begun within one year after its enactment. This provision was stricken out in conference (Senate Report No. 960, page 42, 70th Congress, First Session). The administrative officers have taken the position that the section does not authorize enforced future collections. Instructions to Collectors, Mim. 3660, Cumulative Bulletin VII-2, p. 82 (Prentice-Hall 1930 Federal Tax Service, page 19,344).

We submit, therefore, that, if Section 611 uses the term "payment" to refer only to voluntary payments made after its enactment, no sound basis exists for the application of the same term as applying to enforced payments exacted prior to its enactment.

III.

Section 611 applies to administrative credits and refunds, and was not intended to destroy causes of action in the courts for the recovery of barred collections.

Section 611 of the Revenue Act of 1928 by its terms merely provides that payments made under the conditions described therein "shall not be considered as an overpayment under the provisions of Section 607 relating to payments made after the expiration of the period of limitation on assessment and collection." Section 607 therefore must be examined.

Section 607 by its terms directs that, any tax assessed or paid after the expiration of the period of limitation on assessment and collection "shall be *considered* an overpayment and shall be credited or refunded to the taxpayer if claim therefo is filed within the period of limitation for filing such claim."

Since payments of the kind described include both payments which were never in fact due (true overpayments) and also taxes once due, but barred by limitation (not true overpayments), the reason for providing that they "shall be *considered* overpayments" must be found. This reason is to be found in events occurring prior to the enactment of Section 607.

It was apparently regarded as settled law that collections of barred taxes gave rise to a right of recovery, without any question as to whether the payment was truly an overpayment, until the Court of Claims, in the case of *Toxaway Mills* v. *United States*, 61 Ct. Cls. 363, (reversed on confession of error, 273 U. S. 781) held that where a tax was collected after the period for collection had expired, the taxpay*er could*

not recover for that reason alone, but must show further that he had in fact overpaid the tax on its merits. It further held that the running of the statute of limitations on collection did not operate to extinguish the liability but merely barred the remedy.

Congress, in drafting the Revenue Act of 1926, incorporated a special provision to counteract the effect of this decision. (See Report of Conference Committee House Report No. 356, 69th Congress, 1st Session, p. 55.) This provision is as follows:

> "Sec. 1106 (a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

This section, while disposing of the question as to whether the running of the period of limitation on collection extinguished the liability for the tax, gave rise to confusion by its provision that "no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

The provision referring to *credits and refunds,* was construed by certain taxpayers as barring recoveries in the Courts (a construction given by the Court below to similar provisions in Sections 607 and 611), and certain taxpayers brought suits to enjoin collections of barred taxes upon the theory that if collection was had, all remedies would be lost, and hence that the prohibition of Section 3224 Revised Statutes, against enjoining collection of taxes, did not apply. These suits were defended by government counsel, and re-

sulted in holdings that the prohibition against credits and refunds in Section 1106(a), applied only to administrative action by the Commissioner and did not bar recoveries in the Courts. (*Ellay Company* v. *Bowers*, 25 Fed. (2d) 637, certiorari denied 48 Sup. Ct. 601; *Thornhill Wagon Company* v. *Noel*, 17 Fed. (2d) 407; *Gove* v. *Nichols*, 23 Fed. (2d) 856.

The Court of Claims, in the case of *Adelaide F. Chapman* v. *United States*, 63 Ct. Cls. 424, construed Section 1106(a), Revenue Act of 1926, as preventing recoveries of barred taxes by suit unless the tax had been in fact overpaid. However, as before noted, the Solicitor General joined the taxpayer in opposing this construction of Section 1106(a) and, after the enactment of the Revenue Act of 1928 (in which Sections 607-612 were substituted for Section 1106(a), the case was reversed upon the motion of the Solicitor General. (278 U. S. 660.)

It is clear from what theretofore had transpired that Section 607, in declaring that payments of taxes after the statutory period therefor "shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim" was merely authorizing what Section 1106(a) had been held to prohibit, i.e., administrative credits or refunds by the Commissioner where barred collections had been made, even though there was no true "overpayment" involved. *This was the sole purpose of Section 607, which, like the Sections which preceded it relating to credits or refunds, had nothing to do with rights of action for repayments in the courts.*

The Court below concluded (Opinion, R. 44) that when Sections 607, 611 and 612 of the Revenue Act of

1928 are read together their evident purpose is to counteract the decision of this Court in the case of *Bowers* v. *New York & Albany Lighterage Company,* supra, and that these Sections were intended to prohibit not only administrative refunds, but recoveries in the courts.

In this we think the Court erred, since only Section 611 was enacted to meet situations resulting from the decision in the *Bowers* case, and this Section was by its terms made subsidiary to Section 607—a Section which was intended only to relate to administrative action. The Court in emphasizing that Section 611 provides that illegal "collections" in certain cases shall not be considered overpayments, and in reasoning that if there was no overpayment there could be no cause of action, apparently lost sight of the fact that it is illegal collections—a broader class than true "overpayments" on the merits—which are recoverable in the Courts. *Graham* v. *DuPont,* supra, *Bowers* v. *New York & Albany Lighterage Company,* supra, *Toxaway Miills* v. *United States,* 61 Ct. Cls. 363, reversed, 273 U. S. 781.

IV.

The Court below erred in holding that Section 611 shows an intention to revive a tax liability expressly discharged by law and that so construed there is no violation of the Fifth Amendment to the Constitution.

The court below recognized that Section 1106 (a) of the Revenue Act of 1926 discharged petitioner's liability for the tax, but concluded that Sections 607, 611 and 612 of the Revenue Act of 1928 operated to entitle the Government to keep the money illegally

exacted by the respondent, and to destroy petitioner's cause of action, which had accrued and been asserted in court at the time Section 611 was enacted. (Opinion R. 44).

If petitioner's liability for the sums involved as Federal income taxes had been discharged, the effect ascribed to Sections 607, 611 and 612 of the Revenue Act of 1928 must have been (a) to revive this tax liability; (b) to lay a new tax equal to the amount illegally collected; or (c) to direct arbitrarily that the monies wrongfully gotten by the Government, although no longer due as taxes, should be retained by it.

(a) The conclusion that liability was discharged, or extinguished, was clearly correct whether Section 1106 (a) be regarded as merely declaring the law as it formerly had been, or as operating for the first time with that effect. Nor is it material that collection in this case preceded the enactment of Section 1106 (a), for if the running of the time for collection barred the remedy only, liability continued and was extinguished when Section 1106 (a) came into effect. Such collection as was had was an illegal act, the moneys gotten were subject to the demands of the taxpayers, and could not validly be applied in satisfaction to the tax liability.

Since Section 612 of the Revenue Act of 1928 repealed Section 1106(a), as of February 26, 1926, (the date of its enactment) it may have been considered by the Court below that this repeal operated to revive all liabilities which said Section had declared were extinguished.

However, it seems most reasonable to conclude that the repeal of Section 1106(a) as of the date of its enactment and the substitution therefor of Sections 607 to 612 of the Revenue Act of 1928 was not for the pur-

pose of reviving barred liabilities but was for the purpose of clearing up misapprehensions which had existed as to the meaning of Section 1106(a) insofar as it seemingly prohibited administrative refunds of illegally collected taxes, unless it also appeared that taxpayers had overpaid the tax. This confusion has been discussed herein, ante, at pages 14, 16.

In addition it would seem clear that the revival of an extinquished liability, equally with the laying of a new tax, would be an act of such importance and hardship upon citizens as to require explicit and certain terms in its expression. Such certainty is wholly lacking in the Sections of the Revenue Act of 1928 referred to.

Numerous courts have been unable to find any purpose on the part of Congress to re-create discharged liabilities in the repeal by Section 612 of Section 1106 (a) of the Revenue Act of 1926. *Heiner* v. *Erie Coal & Coke Co.*, 42 Fed. (2d) 214, certiorari granted 1930, No. 508, October Term, 1930, *Wyman Partridge & Co.* v. *United States,* 41 Fed. (2d) 866, certiorari granted 1930, No. 416, October Term, 1930. *United States* v. *John Barth Company,* 27 Fed. (2d)782, reversed on another ground in 279 U. S. 370. *Wettengel* v. *Robinson,* 300 Penn. 355, 150 Atl. 658.

(b) Section 611 does not purport to lay a new tax. On the contrary, this Section and Section 607 each refer to taxes already imposed by law which have been ascertained in amount and assessed against the taxpayer. It can not, therefore, reasonably be said that Congress intended by these Sections to impose a new tax in the amount of the collections previously illegally had.

Nor does Section 611 seem to present a case where a tax is in effect laid retroactively by the ratification

of a collection previously and illegally made, as in *United States* v. *Heinszen & Co.*, 206 U. S. 370, first, because statutes which are intended to ratify illegal collections must do so in express terms, as in other cases where taxes are laid. *United States* v. *Heinszen & Co.*, supra; *Lincoln* v. *United States*, 197 U. S. 419; *DeLima* v. *Bidwell*, 182 U. S. 1. Section 611 does not expressly ratify any illegal collection, and such a ratification would have been impossible because, as heretofore shown, the taxes involved had been laid and had become discharged prior to the enactment of Section 611.

Similarly, Sections 607, 611 and 612 can scarcely be said to have repealed an existing statute of limitation, as in *Campbell* v. *Holt*, 115 U. S. 620, because they do not purport to do so and for the further reason that if liability had been discharged by Section 1106 (a) or under general principles of law, it would require more than the mere removal of a *defense* of the statute of limitations to strike down an existing cause of action.

The fact that the barring of Federal Income taxes by limitations upon collection give rise to common law rights of action against Collectors for money had and received, (Graham v. DuPont, supra, Bowers v. New York & Albany Lighterage Co., supra) would seem to confirm the conclusion that, even without the express provisions of Section 1106(a) of the Revenue Act of 1926, the expiration of the statutory period for the collection of assessed income taxes operated to discharge the liability therefor.

The Court, in the cases of *Danzer & Co.* v. *Gulf & Ship Island Co.*, 268 U. S. 633, 636; *Davis* v. *Mills*, 194 U. S. 451, and *The Harrisburg*, 119 U. S. 199, distinguished the earlier case of *Campbell* v. *Holt*, supra,

which involved the repeal of limitations upon the time for asserting common law liabilities, which applied "to the remedy only" and pointed out that other types of limitations "operate as a limitation upon *liability.*" Many cases were cited in which liabilities were created by statutes and limitations contained in the same or later statutes were held to bar not only the remedy but the liability itself. Income taxes are statutory liabilities, and the limitations upon the collection thereof contained in the same or later Revenue Act are clearly limitations which not only bar the Government's right to enforce collection, but extinguish the taxpayer's liability for the tax.

It would seem obvious that if the liability had been extinguished, it would require something more than a repeal of the statute of limitations to restore liability.

(c) It might be claimed that Section 611 directed the rentention by the government of all money illegally collected by duress, in the special circumstances described, even though all claim thereto as taxes had been extinguished before the money came into the possession of the Government. Such a direction, we submit, would so clearly be an unauthorized direction to confiscate private property as to be ascribed to Congress only when no other view of the statute was possible. As heretofore shown herein, Section 611 by its express terms applies only as a prohibition against administrative credits and refunds and leaves open in the courts all questions as to the right of the Government to retain barred taxes. We submit, therefore, that it should not be presumed that Congress, in enacting Section 611, intended to require the confiscation of property of taxpayers which had wrongfully come into its hands.

If it be assumed that Congress did intend, by Section 611, to bar recoveries in the courts of sums illegally collected from petitioners as taxes, under any of the theories hereinbefore discussed, we submit that said Section is unconstitutional and void because it authorizes the taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The protection afforded citizens by the Fifth Amendment to the Constitution, against Federal statutes which have the effect of taking property without due process of law, includes protection against statutes which re-create or revive liabilities which have become extinguished through lapse of time. *Danzen & Co.* v. *Gulf and Ship Island R. R. Co.*, supra; *Davis* v. *Mills*, supra. This protection also exists against statutes which purport retroactively to create liabilities. *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 336. These cases, it is true, relate to rights as between private parties, but the instant case, although pertaining to sums erroneously taken as Federal taxes is also one between private parties.

The suit in the case at bar is an action under the common law against the respondent in his individual capacity. *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1; *Levy* v. *Wardell*, 258 U. S. 542. The action retains its common law basis, notwithstanding that the revenue laws prescribe conditions precedent to suit, and notwithstanding that, after judgment, the liability may be transferred to the United States. *Patton* v. *Brady*, 184 U. S. 608; *Sage* v. *United States*, 250 U. S. 33.

As thus viewed, the effect given to Section 611 by the Court below is to destroy a right of action which

petitioner had against the respondent as an individual. This plainly would be the taking of property without due process of law, and prohibited to the Congress by the Fifth Amendment.

If, however, the subject-matter of this suit is regarded as primarily Federal taxes and the Government as the real party in interest, the inquiry shifts to whether Section 611 violates the limitations, if any, upon the power of Congress to tax its citizens.

The power of Congress in this field is necessarily of the broadest scope, but is not unlimited. One of these limitations is that Congress must exercise its taxing power so as to produce results which conform to the purposes of taxation, and its enactments which go beyond this and are so arbitrary and discriminatory in operation as to amount to confiscation may not be sustained. *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142.

The Court below was of the opinion that Congress possessed the power to bar refunds of illegally collected taxes even though liability therefor had been discharged, where the discharge was not through payment, and stated as a reason therefor that unless this were so, certain taxpayers would escape their just share in the common burden of taxation (Opinion, R. 45, 46).

It seems probable that Congress, if it possessed the power to revive an extinguished tax in order to equalize the common burden of taxation, might do so as to *all* taxes laid and assessed, but not theretofore collected. In such cases it would be reasonable to retain all moneys illegally collected after the statutory period therefor and to require collection of all unpaid assess-

ments. That is not the situation created under Section 611, as construed by the Court below, or under any possible view of that section as a ratifying statute. Nor does Section 611 even operate to remove the benefit of the statute of limitations from all who had by their own acts "stayed" collections of the tax. Instead, only one out of five types of cases where collections have been "stayed" is reached by the section.

(1) Section 611 does not authorize the retention of moneys illegally collected where collection was stayed by claims for credit (G. C. M. 6296—Cumulative Bulletin VIII-35-4326).

(2) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the Revenue Act of 1928. (I. T. 3660—Cumulative Bulletin VII-2, p. 82.)

(3) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(4) Section 611 does not authorize collection to be made from those who stayed collection by claims in abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period therefor.

(5) Section 611 applies only in cases where collection has been stayed by claims in abatement and where the money wrongfully collected after the liability for Federal taxes had been discharged was in the possession of Government agencies when the Revenue Act of 1928 was enacted, or was voluntarily paid into their hands within one year thereafter.

The application of Section 611 to this limited class, without any apparent reason for the classification, plainly results in the confiscation of private property and in the unreasonable exercise of the powers of taxation possessed by the Congress.

We submit that Section 611, as construed by the Court below, goes beyond the ordinary meaning of the terms employed therein, and is unconstitutional. If construed as relating only to administrative refunds and credits and not to actions in the courts, effect is given to the terms employed in their ordinary sense and meaning, and a result within the power of Congress to provide is reached.

Respectfully submitted,

DONALD V. HUNTER,
ROBERT N. MILLER,
S. LYMAN BARBER,
Counsel for Petitioner.

922 Southern Building,
Washington, D. C.
December 9, 1930.

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CHARLES ELMORE CROPLEY
CLERK

No. 565

In the Supreme Court of the United States

OCTOBER TERM, 1930

WRIGHT & TAYLOR, INC., PETITIONER

v.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT AND MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 565

WRIGHT & TAYLOR, INC., PETITIONER

v.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE for the District of Kentucky

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ON PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT AND MOTION TO ADVANCE

The question presented is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (U. S. C., Supp. III, Title 26, Sec. 2611), bars the right which the petitioner otherwise would have had to recover taxes and interest thereon which had been collected after the statutory period of limitations had expired.

The same question is now presented in a number of cases pending before this Court at the present

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term on writs of certiorari: *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*, No. 36; *Magee* v. *United States*, No. 65; *Oak Worsted Mills* v. *United States*, No. 104; *Taft Woolen Co.* v. *United States*, No. 105; *Second National Bank of Saginaw, Trustees*, v. *United States*, No. 323; *Boston Pressed Metal Co.* v. *United States*, No. 337; *United States* v. *Wyman, Partridge & Co.*, No. 416; *Daniel Reeves, Inc.*, v. *Anderson, Collector*, No. 463; *Roy & Titcomb, Inc.*, v. *United States*, No. 412; *Mascot Oil Co.* v. *United States*, No. 400; *American Glue Co.* v. *United States*, No. 519; *Jennings* v. *Anderson*, No. 529; *Heiner* v. *Erie Coal & Coke Co.*, No. 508.

The material facts in the instant case are substantially the same as in the cases just referred to. A further fact found in the instant case not present in the cases referred to is that after the filing of claims in abatement, and before the expiration of the statutory period for collection of the tax, the taxpayer executed a waiver extending the period for collection, but the claim was not acted upon nor was collection made within the time as so extended. It is the position of the respondent that the circumstance of the waiver does not distinguish the instant case from the other cases presenting the broad question involved.

The pertinent dates in the instant case are as follows (R. 22–24):

> June 17, 1919: Return for the fiscal year ended June 30, 1918, filed.

September 12, 1919: Assessment of tax shown on the return.

August, 1919: Assessment of additional tax for the year ended June 30, 1918.

September 15, 1919: Claims in abatement filed.

December 13, 1923: Waiver filed extending time for assessment.

June 17, 1924: Original 5-year period for assessment and collection expired.

December 13, 1924: Expiration of period for assessment and collection as extended by the waiver.

September 8, 1925: Tax, plus interest, collected.

September 30, 1925: Claim for refund filed.

April 14, 1927: Suit commenced. (R. 1.)

The District Court for the District of Kentucky held that Section 611 of the Revenue Act of 1928 barred recovery. (R. 33.) The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment. (R. 48.)

Since the same question is already before this Court in a number of cases, the Collector does not oppose the granting of the petition in the instant case.

The respondent joins in the request of the petitioner (Pet. p. 7) that, in the event the petition is granted, the case be advanced for hearing with the other cases involving the same question, and

suggests that it be assigned to follow *Jennings* v. *Anderson*, No. 529.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

DECEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

CLERK'S COPY.

Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 104

OAK WORSTED MILLS, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 7, 1930

CERTIORARI GRANTED JUNE 2, 1930

(35,011)

(35,011)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 880

OAK WORSTED MILLS, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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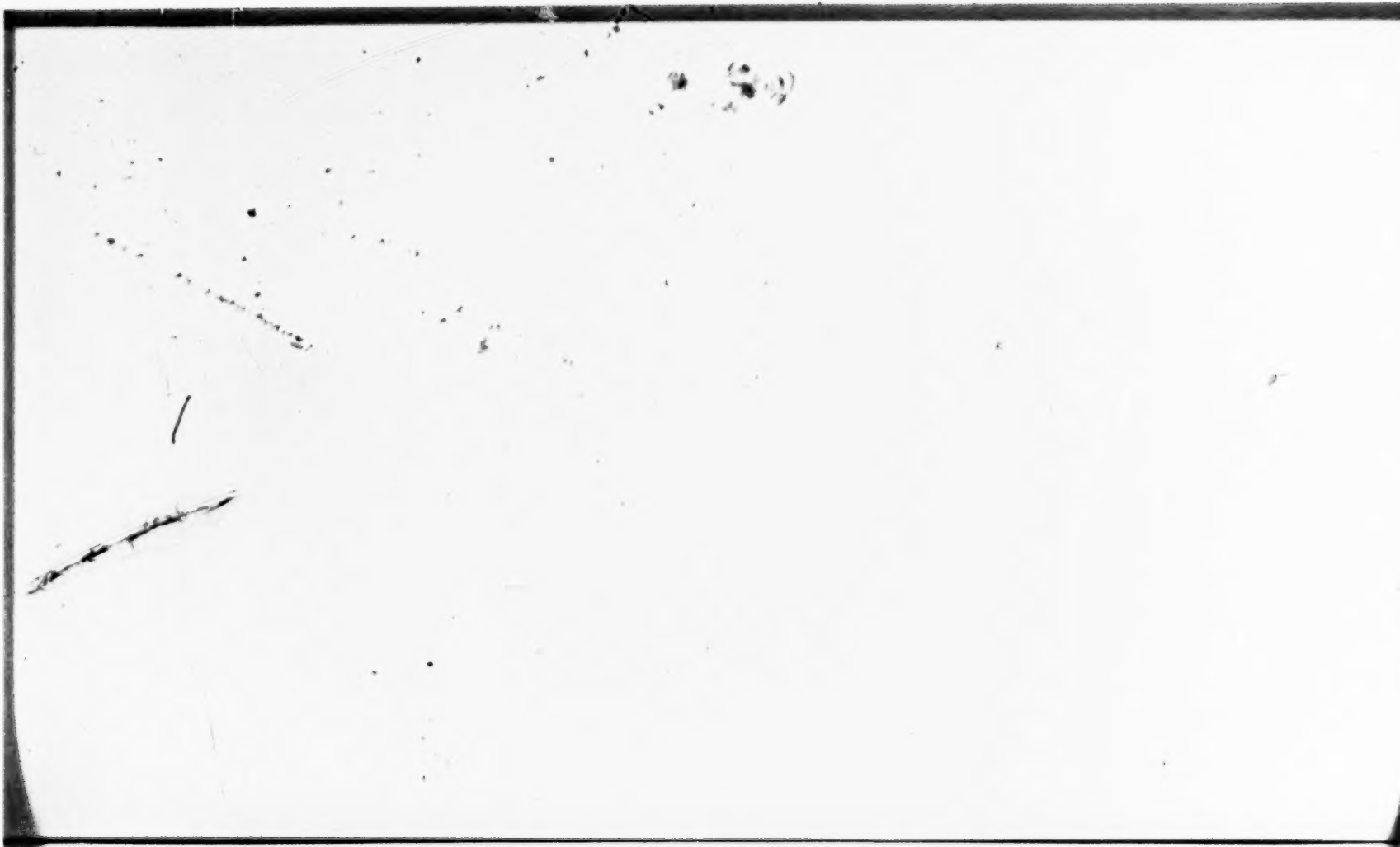

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 880

OAK WORSTED MILLS, a Body Corporate, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Theodore B. Benson, on behalf of Oak Worsted Mills a body corporate, prays that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above entitled cause on February 17, 1930.

Statement

The petitioner, a corporation, on June 16, 1919, duly filed its return of income and profits taxes for the calendar year 1918 and reported therein a tax of $91,994.37 which was paid in full during the year 1919. The petitioner filed its petition in the Court of Claims on April 4, 1928, and the respondent filed a general traverse.

[fol. 2] On June 27, 1921, the petitioner filed a claim for refund, the basis of which claim was an application for assessment of profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918. The Commissioner of Internal Revenue determined the tax under the provisions of Sections 327 and 328 and found an overassessment in the amount of $26,487.97, which was made the subject of a certificate of overassessment bearing date of June 21, 1922, and which said sum was refunded to the petitioner.

On or prior to March 26, 1924, the Commissioner without the petitioner's knowledge or consent made a re-examination of the petitioner's application and on that date notified the petitioner that the previous determination of the tax was erroneous and that the total tax liability under Sections 327 and 328 was $79,262.44 and that an additional tax

was due in the amount of $13,756.02 and shortly thereafter assessed the said amount. On April 12, 1924, and on notice and demand for payment the petitioner filed a claim in abatement in the amount of $13,756.02, on the grounds that the matter had become res judicata and was barred by the statute of limitations and by the provisions of revenue acts then in force.

On February 11, 1925, the Commissioner made a further redetermination of the tax and notified the petitioner that the comparatives used in his previous re-determination were erroneous and that the petitioner had been overassessed $6,345.76 and that the claim in abatement would be allowed for the amount and rejected for $7,410.26.

[fol. 3] On June 1, 1925, the collector made demand for payment of the said sum of $7,410.26. Thereupon the petitioner, in the District Court of the United States for the Eastern District of Pennsylvania, sought to enjoin the collector and the injunction was denied July 1, 1925, 6 F. (2d) 662. On August 27, 1925, the Collector of Internal Revenue again made demand for payment of the said sum of $7,410.26, which together with interest in the amount of $592.82 was paid September 10, 1925.

Statutes Involved

The statutes involved are Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057); Section 250 (d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875); and Section 3226 of the Revised Statutes, as amended (44 Stat. 116).

Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057) with reference to the computation of the excess profits tax and as applicable here read in part as follows:

"Sec. 327. That in the following cases the tax shall be determined as provided in section 328; * * *

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax

computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. * * *

[fol. 4] "Sec. 328. (a) * * * In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary. * * *"

Section 250(d) of the Revenue Act of 1921 (42 Stat. 277, 265, 266) as applicable here reads in part as follows:

"* * * If upon examination of a return made under * * * the Revenue Act of 1918, or * * * a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *"

Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875) read as follows:

"Sec. 607. Effect of Expiration of Period of Limitations Against United States

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or

after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

[fol. 5] "Sec. 611. Collections Stayed by Claim in Abatement

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928, (44 Stat. 116), reads as follows:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

A

Questions Presented

1. Whether the principle of law, that where an administrative officer or head of a department invested by an Act [fol. 6] of Congress with exclusive jurisdiction to determine a matter involving purely administrative judgment and discretion has once reached a conclusion which is communicated agreeable to the requirements of the law his decision is final and conclusive and not subject to reexamination by the department, applies to the Commissioner of Internal Revenue?

2. Had the Commissioner of Internal Revenue authority, under Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266), to make the re-assessment, as an additional assessment to correct an alleged excessive overassessment where the entire tax imposed by statute had theretofore been assessed and paid in full?

3. Do the provisions of Section 611 of the Revenue Act of 1928 (C. 852, 45 Stat. 791, 876) apply to this case?

4. Had petitioner, on April 4, 1928, under Section 250(d) of the Revenue Act of 1921, acquired a vested right of action, a property right under the Constitution?

5. Does Section 611 of the Revenue Act of 1928, enacted May 29, 1928, deprive the Court of Claims of jurisdiction of petitioner's suit and petitioner of its remedy, under Section 3226 of the Revised Statutes, as amended?

B

Reasons for the Allowance of the Writ

1. The holding of the court below that the determination of a profits tax under Sections 327 and 328 of the Revenue Act of 1918 by the Commissioner of Internal Revenue is not final, conflicts with the decision of this Court in the case of Williamsport Wire Rope Co. v. U. S. 277, U. S. 551, 48 S. Ct. 587.

[fol. 7] 2. The holding of the court below that the Commissioner may review and reverse his previous exercise of

discretion in the selection of comparatives for the computation of the tax under Section 328 conflicts with the decisions of this Court in the cases of Ex parte Randolph, 2 Brock (U. S.) 447; U. S. v. Bank of Metropolis, 15 Pet. 245, 40 U. S. 384; West v. Standard Oil Company, 278 U. S. 200, 49 S. Ct. 139 and U. S. v. Arredondo, 6 Pet. 729, 31 U. S. 691, and with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Woodworth v. Kales, 26 F. (2d) 178.

3. The holding of the court below that the principle, that an administrative officers' determination is final, does not apply to the Commissioner of Internal Revenue in this case, conflicts with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Park Falls Lumber Co. v. Burlingame, 1 F. (2d) 855, certiorari denied 266 U. S. 626, 45 S. Ct. 125.

4. The holding of the court below that the Commissioner of Internal Revenue has authority to re-assess as an internal revenue tax a tax previously assessed and collected, conflicts with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of Talcott v. U. S. 23 F. (2d) 897, certiorari denied 277 U. S. 604; and Kelly v. U. S. 30 F. (2d) 193.

5. The holding of the court below that the Commissioner had authority to make the re-assessment and re-collection of an overpayment of a tax legally refunded, amounts to usurpation by the executive department of the functions of the judicial department and the taking of petitioner's property, without due process of law, in violaion of Article III, Section I and Amendment V, respectively, of the Constitution.

[fol. 8] 6. The holding of the court below that the Commissioner may make such re-assessment, in the absence of authority conferred by Congress, conflicts with the decision of this Court in the case of Meriwether v. Garrett, 102 U. S. 501, 26 L. Ed. 197.

7. The foregoing questions are of public importance for the reason that other cases involving the same questions are now pending in the courts and still others are under consideration by the Treasury Department. This is recognized

by the court below. In its opinion the court stated that there are other cases on the docket involving the same questions.

8. The questions involved in this case with reference to Section 611 of the Revenue Act of 1928 are substantially the same as those involved in the case of Graham and Foster Co-partners etc., petitioners, v. Goodcell, Collector, No. 589, October 1929 Term, in which case this Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on March 3, 1930. The decision of the circuit court of appeals is reported in 35 F. (2d) 586.

Wherefore it is respectfully submitted that this petition should be granted.

Oak Worsted Mills, by Theodore B. Benson, Theodore B. Benson, Counsel for Petitioner.

[fol. 1] IN THE COURT OF CLAIMS

No. J-180

OAK WORSTED MILLS, a Body Corporate, Plaintiff,

v.

THE UNITED STATES, Defendant

1. PETITION—Filed April 4, 1928

To the Honorable Chief Justice and Justices of the Court of Claims:

The plaintiff, the Oak Worsted Mills, respectfully represents to this Honorable Court as follows:

1. That plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office and place of business at the City of Philadelphia, in the County of Philadelphia, in said State, and now is, and at all times hereinafter mentioned was, engaged in the manufacture and sale of worsted goods; and presents this, its petition and claim,

in its own right as such corporation and against the United States.

2. That on or about March 12, 1919, conformably to an act of Congress, entitled "An Act to Increase Revenue and For Other Purposes," approved April 17, 1919, and as required by the Commissioner of Internal Revenue, plaintiff filed with the Collector of Internal Revenue at Philadelphia, Pennsylvania, on form furnished to it by the said Commissioner for such purpose, its original income and profits tax [fol. 2] return for the calendar year 1918, and on an estimated tax liability for said calendar year of $80,000.00, paid to the said Collector the sum of $20,000.00, the same being the first quarterly installment as provided in Section 250 (a) of the Revenue Act aforesaid.

3. That thereafter, on or about June 16, 1919, plaintiff filed with the said Collector of Internal Revenue an amended and supplemental return, disclosing, among other things, the following:

Gross sales	$927,699.08
Cost of goods sold	756,690.68
Invested capital taxable year	116,935.19
Net income	124,488.61
War and excess profits tax (Sec. 301)	87,836.07
Tax at 12%	4,158.30
Total war profits, excess profits and income tax	$91,944.37

The amended and supplemental return indicated an additional amount due (computed under Section 301 of said Act) of $71,944.37, which said amount was, in due course, paid to the said Collector, making in all a total sum of $91,944.37 so paid on a net income of $124,488.61.

4. Thereafter and on or about June 27, 1921, plaintiff filed with the Commissioner of Internal Revenue through the office of the aforesaid Collector a formal application for assessment of its profits tax for said year under the provisions of Sections 327 and 328 of the Revenue Act aforesaid. Said application was attached to a formal claim for refund of taxes in the sum of $33,425.75, based on the application aforesaid.

5. That thereafter, in April, 1922, in consequence of said claim and appeal, said Commissioner, upon an audit of said [fol. 3] return and careful consideration of all the facts, as set forth in statements filed with said return, found the tax, assessed against plaintiff for said year, to be in excess of the amount due and caused plaintiff's said tax liability to be computed under the relief provisions of said Act and as a result thereof an overassessment was disclosed in the sum of $26,487.97.

6. That said overassessment was made the subject of a certificate of overassessment which was scheduled through the office of the Collector aforesaid for the adjustment of plaintiff's account, and duly rescheduled to the said Commissioner on or about July 14, 1922, and plaintiff was so notified by departmental letter dated that day, copy annexed, marked "Exhibit A."

7. Subsequently, said certificate, bearing date of June 21, 1922, copy annexed, marked "Exhibit B," was forwarded to and received by plaintiff together with Treasury check in the sum of $26,487.97, in payment of the refund due plaintiff on account of the overassessment aforesaid; that plaintiff accepted said check in payment of said refund of taxes erroneously assessed and collected for said year, and in due course received the proceeds thereof, all with the knowledge, consent and acquiescence of the United States, and subsequently applied the same to the payment of expenses incident to the procuring of said refund and otherwise to its own use and benefit.

8. That on or prior to March 26, 1924, said Commissioner, without plaintiff's knowledge or consent, assumed to and did make a re-examination of plaintiff's said application and claim which he had so allowed as herein set forth, and assumed to decide and did decide that his previous de- [fol. 4] termination of plaintiff's tax liability for said calendar year 1918, as computed under the relief provisions of the Revenue Act of 1918, was erroneous, and assumed to decide and did decide that an additional tax of $13,756.02 was then due on account of the overassessment, which he had previously determined, having been erroneous.

9. That thereupon said Commissioner, by a departmental letter dated that day, of which a copy is hereto annexed, marked "Exhibit C," advised plaintiff of said re-examination and re-determination, and notified it, among other things, that said amount of $13,756.02 would be listed for assessment immediately without giving the usual thirty-day notice as provided in Section 250(d) of the Revenue Act of 1921, and that said amount was listed as an additional assessment on a schedule which was approved by said Commissioner shortly thereafter.

10. In due course and upon notice and demand from the said Collector of Internal Revenue for payment of the alleged additional tax, plaintiff filed on or about April 12, 1924, with the said Commissioner and also with the said Collector claims in abatement of and protest to the said alleged additional tax on the grounds that the original determination resulting in the refund aforesaid of $26,487.97 was lawfully made; that the plaintiff's tax liability had theretofore been adjudicated and had therefore become res judicata; that the said assessment was barred by the statute of limitations. Thereafter, in due course, plaintiff filed with the said Commissioner a brief in support of said claim in abatement.

[fol. 5] 11. That on or about July 28, 1924, the aforesaid brief, in support of plaintiff's protest to the findings of the Special Assessment Section, Income Tax Unit of the Bureau of Internal Revenue, was transmitted by said Unit to the Commissioner of Internal Revenue for his decision thereon, accompanied by a letter, copy of which is hereto annexed, marked "Exhibit D," purporting to state the issues, facts and contentions respecting the said determination and alleged additional assessment.

12. That on or prior to February 11, 1925, the said Commissioner of Internal Revenue, after another alleged re-examination of plaintiff's case, made the third re-determination and found and so notified plaintiff by departmental letter dated that day, copy annexed, marked "Exhibit E," that the comparatives used in determining the additional tax liability of $13,756.02 were improper and that the correct tax for said year was $72,916.66, and that it had been

overassessed the sum of $6,345.76, and further notified plaintiff that its claim in abatement of $13,756.02 would be rejected for $7,410.26.

13. That on or about August 27, 1925, the said Collector, in writing, made the second demand for payment of the aforesaid alleged additional tax of $7,410.26 and penalty in the sum of $592.82, accompanying said demand with a threat to enforce such payment by seizure and sale of plaintiff's property, and that on, or about September 5, 1925, plaintiff fearing that otherwise said Collector would carry out said threat, and in order to avoid the seizure and sale of its property as aforesaid, paid, under protest, to the [fol. 6] said Collector the amount of said alleged additional tax with penalty, making a total of $8,003.08.

14. That pursuant to the statute in such cases made and provided and the regulations prescribed by the Secretary of the Treasury, plaintiff on or about May 7, 1927, duly made and filed with said Collector, a claim for refund, complete copy of which is hereto annexed, marked "Exhibit F," of $6,345.76 (or such greater amount as is legally refundable), so illegally levied, assessed and collected as above alleged, with interest, which claim for refund was duly verified and contained on Form 843 as prescribed by said regulations and was made on the grounds: (1) That the alleged tax was erroneous, excessive and illegal; (2), That the Collection of the same was barred, at time of payment, by the tolling of the statute of limitations, for the following reasons, to-wit: (a) That payment was exacted more than five years after the return was filed; (b) that no suit or proceeding was instituted within the five-year period; (c) that the return was not false or fraudulent, neither had "both the Commissioner and the taxpayer consented in writing to a later determination, assessment, and collection of the tax," and (3) that, by reason of the expiration of the statute of limitations applicable, not only was the procedure for its collection barred, but the right, if any, of the Government to the alleged tax itself was extinguished. Reference was made to said claim in abatement together with the supporting evidence and brief, all of which was re-affirmed and made a part of said claim for refund with the same force and effect as if thereto at-

tached; the right was thereby expressly reserved to submit additional facts, evidence, etc., in support of said claim by brief or otherwise, which should be made a part thereof [fol. 7] as though attached thereto, and plaintiff further claimed its right to any and all benefits given to it by any other Revenue Act pertinent in the premises.

19. That on or about February 15, 1928, said Commissioner rejected plaintiff's claim for refund, aforesaid, on the theory that the assessment was made within the statutory period and that Section 278(d) of the Revenue Act of 1924, granting six years within which to make collection, was applicable and so notified plaintiff by departmental letter dated that day, copy annexed marked "Exhibit G."

20. Plaintiff avers that no action has been had other than as aforesaid, either by Congress or by any of the Departments of the Federal Government, except plaintiff filed an appeal with the United States Board of Tax Appeals, created under the Revenue Act of 1924, and pending which, due to the issuance of a warrant of distraint against its property, plaintiff by application for a writ of injunction, undertook to restrain the collection of said alleged additional tax. Said injunction having been denied and to avoid the threatened seizure and sale of its property as aforesaid, plaintiff paid the alleged aforesaid additional tax and, for alleged lack of jurisdiction, the aforesaid Board of Tax Appeals, on motion of the said Commissioner, dismissed the plaintiff's said appeal; that its claim for abatement and refund aforesaid, and all of the proceedings had and taken by plaintiff before the Commissioner of Internal Revenue and the Treasury Department were, in all things, duly presented and made in accordance with and pursuant to the statutes, rules and regulations; and that the said defendant, the United States, through and by its Commissioner of [fol. 8] Internal Revenue and Secretary of the Treasury, still has and retains, unlawfully, the amount of money hereinbefore and hereinafter complained of.

21. Plaintiff avers that the Commissioner lawfully considered and allowed its application for assessment of its profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918, resulting in a refund of $26,487.97;

that said Commissioner found, as a matter of fact, that plaintiff had been over-assessed and had overpaid the tax imposed by said Act, which said refund in said amount was lawfully refunded to plaintiff under Section 3220 of the Revised Statutes as amended; that said finding and decision of the Commissioner, with all the facts of plaintiff's case before him, were upon the merits of said application and claim; that the same were not due to fraud or error in mathematical calculation. That in all things plaintiff verily believes and therefore avers, the United States is bound and concluded thereby.

22. Plaintiff avers that the act of the Commissioner of Internal Revenue, in considering its application and claim as aforesaid and determining the said overassessment of $26,487.97, was the last and final act within his power to do and perform respecting plaintiff's tax liability for the calendar year 1918. That when the aforesaid refund of $26,487.97, based on said overassessment, was allowel by the Commissioner and accepted by it the Commissioner had exhausted his jurisdiction. He was functus officio.

23. Plaintiff avers that it had therefore paid the sum of $91,944.37, as taxes, for said year 1919. That said amount [fol. 9] represents the maximum amount assessable under the statutes; that the said alleged additional assessment and collection of $7,410.26 represents a total payment, as alleged taxes, an aggregate sum of $99,355.23, for said year, therefore, the said additional assessment, so-called, is not an assessment of an additional tax, but is a re-assessment of an original tax which had theretofore been erroneously assessed and collected but subsequently lawfully refunded and paid back and accepted by plaintiff, at which time the question of its tax liability became and was thereafter res judicata.

24. Plaintiff avers that it never at any time owed to the that said Commissioner found, as a matter of fact, that in excess of $65,506.40. That its said tax liability for said calendar year 1918 should have been originally computed under the relief provisions of the Revenue Act of 1918, by reason whereof the said amount of $91,944.37, assessed and paid, under said Section 301, as aforesaid, exceeded by $26,487.97, the amount of taxes lawfully due.

25. Plaintiff avers that its obligation to the United States for taxes for the calendar year 1918 had theretofore been discharged by payment in full, and the assessment therefore was no longer in force. That the alleged additional assessment of $13,756.02 by the Commissioner was not and could not be, in any sense, a tax, as by his prior act, he had exhausted all administrative and executive authority he had over the subject. That his act in making said re-determination and alleged additional assessment was illegal, in that it was merely an attempt to collect moneys which he claimed had been erroneously paid out by him or upon his author- [fol. 10] ity. That the courts alone are clothed with authority to pass upon and determine the legality and correctness of his act in finding the over-assessment resulting in the refund aforesaid. That the act of the Commissioner, in making the alleged re-determination and so-called additional assessment and collection as aforesaid, arrogated authority which Congress, under the Constitution, is powerless to confer. That in so doing he usurped the functions of the Judiciary in violation of Article III, Section I of the Constitution.

26. Plaintiff avers that the aforesaid illegal and unconstitutional acts of the Commissioner, in making the said alleged additional assessment and later collecting the same by means of threatened distraint, thus by compulsion forcing plaintiff to pay the alleged additional tax, denied the plaintiff the right of intervention and protection of the Judiciary and strikes down its legal vested property rights by taking its property without due process of law, in violation of the Fifth Amendment to the Constitution. That it also violates the Seventh Amendment to the Constitution in that it denied to the plaintiff the right of trial by jury.

27. Plaintiff avers that the Commissioner of Internal Revenue, upon its application theretofore filed, having found and declared of record (as provided in subdivision (d) of Section 327 of said Act) that the tax, if determined without the benefit of said Section would, owing to abnormal conditions affecting the capital and/or income of plaintiff, work upon plaintiff an exceptional hardship, evidenced by gross disproportion between the tax computed without benefit of said Section and the tax computed by reference

to representative corporations specified in Section 328, and [fol. 11] having theretofore correctly computed said tax according to the provisions of said Section, and having theretofore lawfully refunded and paid back the overassessment aforesaid, the United States was and is, in the absence of fraud, forever estopped from asserting the alleged additional tax libility.

28. Plaintiff avers that the aforesaid acts of the Commissioner of Internal Revenue in assuming authority to review, re-determine and revise his previous computation of plaintiff's taxes for the said calendar year, and to reassess and collect the same by means of threatened distraint, as aforesaid, is unprecedented, arbitrary and capricious.

29. Plaintiff avers that the Commissioner of Internal Revenue having lawfully considered its application and claim as aforesaid and having refunded and paid back the overassessment and the plaintiff having accepted said refund in good faith and made application thereof as aforesaid, said subsequent reassessment and collection by said Commissioner of Internal Revenue, through unlawfully inflating himself into both judge and executioner, as aforesaid, has already worked upon plaintiff an exceptional hardship and will, unless the relief herein prayed for be granted, result in irreparable injury.

30. Plaintiff avers that, in any case, the collection of said alleged additional tax was illegal and in violation of Section 250(d) of the Revenue Act of 1921, as the period of limitations, as provided therein, had already expired; that said statute of limitations began to run on March 12, 1919, the date on which plaintiff's original return was filed; that no [fol. 12] suit or proceeding was begun within five years after the filing of said return; that no consent in writing was entered into between the Commissioner and plaintiff for a later determination, assessment, and collection of the tax as provided in said sub-section.

31. Plaintiff avers that it has never received but is entitled to lawful interest, on the refund of $26,487.97 aforesaid.

32. Plaintiff avers that it is now, and has always been, the sole owner of the claims hereinbefore referred to, and

that it has not assigned or transferred the same, or any part thereof, or interest therein, and that the same is just, due and unpaid; that it has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the said government, and that it believes the statements herein made to be true, and that it is entitled to the full amount of its claims from the United States, after allowing all just credits and off-sets.

Wherefore, the premises considered, plaintiff prays judgment against the Uuited States in the principal sum of $8,003.08, with lawful interest from September 8, 1925, and lawful interest on the refund of $26,487.97 aforesaid.

Guil Barber, Attorney for Plaintiff.

Address of Plaintiff's Attorney: Guil Barber, 816-818 Denrike Bldg., 1010 Vermont Ave. N. W., Washington, D. C.

[fol. 13] *Duly sworn to by Clarence L. Mitchell. Jurat omitted in printing.*

[fol. 14] EXHIBIT A TO PETITION

Copy

Treasury Department, Washington.

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:Ad:R:CC:HJH.

July 14, 1922.

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pennsylvania.

Attention Mr. Clarence L. Mitchell

SIRS: Receipt is acknowledged of your letter dated June 14, 1922, relative to your claim for refund of $48,204.81, income tax for the years 1917 and 1918.

In reply you are advised that the records of the Bureau indicate the receipt of the above-mentioned claim, also a claim in the amount of $1;457.00 for the year 1919.

You are advised that the schedule which included the certificates of overassessment covering your income tax for the years 1918 and 1919 has been returned to this office by the Collector of Internal Revenue for your District. Final settlement will be made within a very short time.

Respectfully, E. H. Batson, Deputy Commissioner,
by C. B. Allen.

[fol. 15] EXHIBIT B TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Certificate of Overassessment

Income Tax Unit

IT:SA:SM. Number: 196,707.
LP-A5148. Allowed: $26,487.97.

Oak Worsted Mills, B and Tioga Sts., Philadelphia, Pa.

SIRS: An audit of your income tax return for 1918, Form 1120, and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

After careful consideration of all the evidence submitted, you are advised that your appeal for assessment under Sections 327 and 328 of the Revenue Act of 1918, has been allowed.

The result thus determined, after giving effect to the necessary changes in net income, developed through audit of the return, indicates an overassessment of $26,487.97, specific details of which are as follows:

Net income reported		$124,488.61
Add taxable Liberty Bond interest	$732.82	
Less reserves for discount	2.15	
		730.67
		$125,219.28

(For computation of tax, see page 2 attached.)

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the Collector of Internal Revenue for your district.

[fol. 16] 2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Respectfully, E. H. Batson, Deputy Commissioner, by S. A. Alexander, Head of Division.

Schedule Number: 1317. District: 1st Pa. Account Number: 1919-402107. Amount refunded: $26,487.97. Instructions executed June 21, 1922.

B. D. McCaughn.

Computation of Tax

Profits tax			$57,736.39
Net income		$125,219.28	
Interest, U. S. Bonds	$732.82		
Profits tax	57,736.39		
Exemption	2,000.00		
		60,469.21	
Amount taxable at 12%		$64,750.07	7,770.01
Total tax assessable			$65,506.40
Tax previously assessed			91,994.37
Indicating an overassessment of			$26,487.97

[fol. 17] EXHIBIT C TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:E:SM. WWB-A-5148.

March 26, 1924.

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pa.

Sirs: Reference is made in your income and profits tax return, Form 1120, for the calendar year 1918 and to a certificate of overassessment issued by this office in your favor, in the amount of $26,487.97, computed under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

A reexamination has been made of your application under the provisions of Sections 327 and 328 of the Revenue Act of 1918, together with all other evidence in the case, and you are advised that the above-mentioned determination of your tax liability was erroneous.

A correct computation of your tax under Sections 327 and 328 of the Revenue Act of 1918 has been made and the additional assessment necessary to correct the excessive overassessment erroneously determined will be listed immediately without giving the usual thirty days' notice, as provided in Section 250(d) of the Revenue Act of 1921. A detailed computation of the amount of this additional assessment is shown in the attached statement.

The Bureau will, therefore, entertain a claim in abatement if filed within ten days of receipt of notice and demand from the Collector of Internal Revenue for your district in accordance with the provisions of Article 1006, Regulations 62.

[fol. 18] An appeal covering the basis of the claim should be filed setting forth in full all information upon which you base your protest against the above assessment and any additional facts in support of your claim for the application of the relief provisions of the Revenue Act of 1918. This appeal should be filed in triplicate and should be addressed to the Commissioner of Internal Revenue for the specific attention of IT:E:SM-WWB-A-5148.

If an appeal is not filed, under no circumstances should payment be made until a bill is received from the Collector

of Internal Revenue for your district and remittance should then be made to him.

Respectfully, J. G. Bright, Deputy Commissioner.

Statement

IT:E:SM. WWB-A-5148

In re Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pa.

Computation of 1918 Tax under Section 328

Net income as shown by agent's report			$125,219.28
Profits tax, Section 328			73,368.23
Net income		$125,219.28	
Less:			
Interest on U. S. obligations not exempt	$732.82		
Profits tax	73,368.23		
Exemption	2,000.00		
		76,101.05	
Balance taxable at 12%		$49,118.23	
Tax at 12%			5,894.19
Total tax liability			$79,262.42
Original tax, June, 1919, account #402107		$91,994.37	
Less overassessment		26,487.97	
			65,506.40
Additional tax due			$13,756.02

[fol. 19] Exhibit D to Petition

IT:E:SM. WWB-A-5148

From: Special Assessment Section, Income Tax Unit.
To: Commissioner of Internal Revenue.

Case of Oak Worsted Mills, B and Tioga Streets, Philadelphia, Penn. Incorporated April 14, 1916. Business: Manufacture of cotton cloth, undyed and unfinished.

Statement

Year under audit: 1918.
Additional Tax: $13,756.02.

Issues

The issues raised in appellant's brief filed upon appeal are:

(1) That audit under Section 328 of the Revenue Act of 1918 showing a total tax liability of $65,506.40, should be sustained, and should not be changed as proposed in office letter dated March 26, 1924.

(2) That the Commissioner of Internal Revenue is without authority to reopen a case, once closed with overassessment determined and accepted by the taxpayer and payment made by the Treasurer of the United States of such refund as found due.

Facts

(1) The previous audit made in April, 1922, indicated a total tax liability of $65,506.40. The audit of March 26, 1924, shows a tax liability of $79,262.42.

Taxpayer's Contention

(1) That the previous audit should be sustained because the adjustment was equitable and just.

[fol. 20] Unit's Contention

(1) The Unit is unable to concede the taxpayer's contention for the reason that the overassessment indicated by the previous audit is erroneous.

Facts

(2) The taxpayer filed on June 16, 1919, an income and profits tax return showing a total tax liability of $91,994.37, which was assessed and paid.

On December 19, 1922, a Revenue Agent made a report on his examination of taxpayer's books and accounts, which indicated an additional tax due for 1918 of $426.14.

The Unit in April, 1922, reduced appellant's income and profits tax liability $26,487.97, based on a computation of appellant's profits taxes under Section 328 of the Revenue Act of 1918.

The Unit in March, 1924, redetermined appellant's income and profits tax liability under the provisions of Section 328 of the Revenue Act of 1918, and found the total income and profits tax of taxpayer to be $79,262.42. The difference between this amount and the taxes paid, $13,756.02, was assessed March 26, 1924.

Appellant's Contention

(2) In appellant's brief, sworn to April 21, 1924, it is contended that the Commissioner of Internal Revenue has no authority to reopen this case.

Unit's Contention

(2) The Unit can not concede the taxpayer's contention for the reason that the Commissioner of Internal Revenue is empowered by Section 250 of the Revenue Act of 1918 to make the assessment appealed against. In support of this contention, office decision 1968, ruling No. 111-14-1479 is cited.

The additional tax referred to has been assessed and abatement claims filed.

[fol. 21] A copy of this letter of transmittal is being forwarded to the taxpayer for its information.

(Signed) J. G. Bright, Deputy Commissioner.

Enclosures

1. Appellant's brief, April 21, 1924, in triplicate.
2. Claim for abatement, $13,756.02, 1918.
3. Income and profits tax return, 1918.

a. Tentative return.
b. Statement relative inventories.
c. Balance sheets, December 31, 1917 and 1918.
d. Stock ownership statement.
e. Schedules A-2, A-12, A-13, A-14, A-18, A-23, A-24.
f. Superficial audit record.

g. Data and key sheets, April 19, 1922,-
h. Confidential Memorandum April 19, 1922.
i. Data and Key Sheets, March 26, 1924.
4. Revenue Agent's report, December 19, 1921.
5. Correspondence and appellant's original application for assessment under the provisions of Section 328 of the Revenue Act of 1918.
6. Income and excess profits tax returns, 1917, with enclosures.
7. Working papers, 1918 consideration.
8. Working papers, 1917 consideration.

lvgG.

[fol. 22] EXHIBIT E TO PETITION

Treasury Department, Washington

IT:E:SM. CDL-A-5148

Feb. 11, 1925.

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pennsylvania

SIRS: Reference is made to your income and profits tax return for the calendar year 1918 and to your protest dated April 21, 1924, and additional information subsequently submitted.

You are advised that after a thorough review of your case, the Bureau holds that the Commissioner of Internal Revenue may assess any tax found to be due even though such tax may have been previously erroneously abated or refunded, provided that such assessment is made within the time prescribed by statute; and that the comparatives previously used in the determination of your tax liability under the provisions of Section 328 of the Revenue Act of 1918 were improper.

A redetermination of your tax liability under the provisions of Section 328 of the Revenue Act of 1918 is as follows:

Net Income

Net income	$125,219.28

Computation of Tax

Profits tax, Section 328			$66,157.14
Net income		125,219.28	
Less:			
Interest on U. S. obligations not exempt	$732.82		
Profits tax	66,157.14		
Exemption	2,000.00		
	%	68,889.96	
Amount taxable at 12%		$46,329.32	6,759.52
Correct tax liability (1918)			$72,916.66
[fol. 23] Amount brought forward			$72,916.66
Previously assessed:			
Original assessment (account 402107)		$91,994.37	
Additional assessment (March, 1924, P. O. L. 3, Spl. 22)		13,756.02	
Total		$105,750.39	
Less overassessment April 20, 1922		26,487.97	
Net tax assessed			$79,262.42
Correct tax liability			72,916.66
Overassessment (1918)			$6,345.76

In accordance with the above conclusions your claim for the abatement of $13,756.02 will be rejected for $7,410.26.

The Collector of Internal Revenue for your district will notify you as to the time and manner of making payment.

Upon receipt of notice and demand from that official payment should be made to his office in accordance with the conditions of his notice.

Your case is, therefore, deemed closed by the Bureau.

Respectfully, J. G. Bright, Deputy Commissioner.

[fol. 24] EXHIBIT F TO PETITION

Claim for
Abatement of Tax Assessed

Credit Against Outstanding Assessments

X Refund of Taxes Illegally Collected

Refund of Amounts Paid for Stamps Used in Error or Excess

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pa.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From Jan. 1	1918
To Dec. 31	1918

1. Business in which engaged: Weaving cloth.
2. Character of assessment or tax: Income and profits tax.
3. Amount of assessment or stamps purchased: $——.
4. Reduction of Tax Liability requested (Income and Profits Tax): $——.
5. Amount to be abated: $——.
6. Amount to be refunded (or such greater amount as is legally refundable) plus interest: $6,345.76.
7. Dates of payment (see Collector's receipts or indorsements of canceled checks): Sept. 5, 1925.

(If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.
9. District in which unpaid assessment appears: ——.

[fol. 25] 10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked; period from —— to ——: $——.

Deponent verily believes that this application should be allowed for the following reasons:

1. That the alleged tax is erroneous, excessive and illegal.

2. That the collection of said alleged tax was barred, at time of payment, by the tolling of the statute of limitations, for the following reasons, to-wit:

a. That payment was exacted more than five years after the return was filed;

b. That no suit or proceeding was instituted within the five-year period;

c. That the return was not false or fraudulent, neither had "both the Commissioner and the taxpayer consented in writing to a later determination, assessment, and collection of the tax." (See Sec. 250(d), Rev. Act 1921.)

3. That, by reason of the expiration of the statute of limitations applicable, not only was the procedure for its collection barred, but the right, if any, of the Government to the alleged tax itself, is extinguished.

(See U. S. Supreme Court decision Bowers v. New York & Albany Lighterage Co., Same v. Seaman, Same v. Fuller, Nos. 366,–7 & 8, delivered Feb. 21, 1927, also Toxaway Mills v. U. S., reversed decision Court of Claims on motion Sol Gen., Mar. 17, 1927. Also U. S. v. Cabot, Sup. Ct. Dist. Col., June 15, 1926; also U. S. v. Whyel, Dist. Ct. U. S., W. D. of Pa., Equity #1227.)

Reference is here made to a Claim in Abatement together with supporting evidence and brief, heretofore filed with the Commissioner of Internal Revenue in reference to the said alleged tax, all of which is hereby reaffirmed and made [fol. 26] a part hereof with the same force and effect as if hereto attached.

The right is hereby expressly reserved to submit additional facts, evidence, etc., in support of this claim by brief or otherwise, which shall be made a part hereof as though attached hereto.

Deponent further claims its right to any and all benefits given to it by any other Revenue Act pertinent in the premises.

Interest demanded.

(Signed) Oak Worsted Mills, by Clarence L. Mitchell, Treasurer. (Seal.)

Sworn to and subscribed before me this 2d day of May, 1927. Jean S. Boyer, Notary Public. (Seal.)

[fol. 27] EXHIBIT G TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:E:RR. JSR.

February 15, 1928.

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pennsylvania.

SIRS: Reference is made to your claim for refund in the amount of $6,345.76 filed with respect to the taxable year 1918.

It appears that your return of income for the taxable year 1918 was filed on June 16, 1919, disclosing tax due of $91,994.37. Subsequently, or in March, 1924, an additional tax of $13,756.02 was assessed. A claim for abatement was filed covering the additional tax and upon consideration such claim was allowed in the amount of $6,345.76 and rejected in the amount of $7,410.26. A Certificate of Overassessment was issued for $6,345.76 and such amount was abated. A payment of $7,410.26 was made under date of September 10, 1925.

In your claim for refund you contend that inasmuch as payment of the tax in question was made subsequent to the five-year period provided by Section 250(d) of the Revenue Act of 1921, collection thereof as of the date of payment was barred, and that such payment should be refunded.

As previously stated your return of income for 1918 was filed on June 16, 1919, and the five-year period within [fol. 28] which the Government could assess and collect taxes due for that year expired on June 16, 1924, or subsequently to the passage of the Revenue Act of 1924. This office has consistently held that in those cases where the five-year period within which taxes due for 1918 could be assessed and collected expired subsequent to the enactment of the 1924 Act, the six-year collection period provided by Section 278(d) of that Act is applicable.

In view of the fact that the tax in question was assessed within the five-year period provided by Section 250(d) of the Revenue Act of 1921 and collection thereof made within the six-year period provided by Section 278(d) of the Revenue Act of 1924, this office is of the opinion that such tax was legally collected and can not be refunded.

Your claim is, accordingly, rejected and the rejection will officially appear on the next schedule to be approved by the commissioner.

Respectfully, C. B. Allen, Deputy Commissioner.

[fol. 29] II. General Traverse—Filed May 14, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission

On May 13, 1929, this case was argued and submitted on merits by Mr. William Meyerhoff, for the plaintiff, and by Mr. George H. Foster, for the defendant.

[fol. 30] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green J.**—Filed December 2, 1929

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

I

On or about March 12, 1919, the plaintiff, a corporation, filed with the collector of internal revenue at Philadelphia, Pennsylvania, for the calendar year 1918, a paper (Form 1031 T) headed "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," and on March 20, 1919, paid the sum of $20,000.00 as one-fourth of the estimated tax of $80,000.00 shown on said tentative return.

II

On June 16, 1919, the plaintiff filed a detailed corporation income and profits tax return for the calendar year 1918 on Form 1120, provided by the Bureau of Internal Revenue, setting forth in the various schedules therein the detailed information provided for in said form, showing a total net income of $124,488.61, with a normal tax due of $4,158.30 and an excess-profits tax of $87,836.07, making a total tax for said year of $91,994.37, and paid the balance of $71,994.37, due on said taxes in three installments during the year 1919, as follows:

June 16, 1919	$25,997.19
September 15, 1919	22,998.59
December 15, 1919	22,998.59

III

On or about June 27, 1921, plaintiff duly filed a formal application for assessment of its profits tax under the provisions of sections 327 and 328 of the revenue act of 1918. [fol. 31] Said application was attached to a formal claim for refund of taxes alleged to have been illegally collected for the year 1918 in the sum of $33,425.75 and was based on said application for special assessment.

IV

In the month of April, 1922, the Commissioner of Internal Revenue, in consequence of said application and claim, caused plaintiff's tax liability to be computed under the

relief provisions of said act and found, as a result thereof, that plaintiff had been overassessed the sum of $26,487.97. Said overassessment was made the subject of a certificate of overassessment bearing date of June 21, 1922, which was forwarded to and received by plaintiff together with a Treasury check in the sum of $26,487.97, and in due course plaintiff received the proceeds thereof.

V

On or prior to March 26, 1924, the commissioner without plaintiff's knowledge or consent made a reexamination of plaintiff's application and decided and so notified the plaintiff by letter dated that day that his previous determination in finding the total tax assessment to be $65,506.40 was erroneous, and decided that the "total tax liability" under sections 327 and 328 was $79,262.42, and that additional tax in the amount of $13,756.02 was due, and shortly thereafter made an assessment of said additional tax. This assessment of additional tax was made more than five years after the instrument referred to in Finding I was filed.

VI

On April 12, 1924, upon notice and demand for payment of said collector, plaintiff filed a claim in abatement of the alleged additional tax of $13,756.02, on the grounds that the matter had become res judicata and was also barred by the statute of limitations and by the provisions of the revenue acts then in force.

VII

On or about February 11, 1925, the said commissioner made another redetermination of plaintiff's tax liability for the year 1918 and notified plaintiff by departmental letter that the comparatives used in his previous redeterminations were erroneous and that plaintiff had been overassessed $6,345.76, and that claim in abatement of $13,756.02 would be rejected for $7,410.26, and certificate of overassessment in the amount of $6,345.76 thereafter issued. On or about March 26, 1925, plaintiff filed an appeal from the alleged deficiency of $7,410.26 with the United States Board of Tax Appeals.

VIII

On June 1, 1925, said collector again demanded payment in writing, advising plaintiff that distraint warrant had been issued, and unless payment was made promptly said warrant would be placed in hands of deputy collector for [fol. 32] personal service. On or about June 22, 1925, in the District Court of the United States for the Eastern District of Pennsylvania, a temporary restraining order was issued against the said collector pending disposition of a motion for a preliminary injunction, pending the aforesaid appeal to the Board of Tax Appeals, which said motion was denied on or about July 1, 1925.

IX

On August 27, 1925, said collector again demanded payment of the amount of $7,410.26, with interest in the sum of $592.82, and, under threat of seizure and sale of plaintiff's property, payment of the total sum of $8,003.08 was made to collector, under protest, on September 10, 1925.

X

On November 18, 1925, the said appeal to the United States Board of Tax Appeals was dismissed on motion of counsel for the said commissioner on the ground that the assessment had been paid and therefore the said board was without jurisdiction.

XI

On May 7, 1927, plaintiff filed a claim, on Form 843, for refund of $6,345.76 (or such greater amount as is legally refundable). Said claim for refund was rejected on or about February 15, 1928. The form of the claim for refund is not in controversy.

XII

The total tax as finally determined by the said commissioner is $72,916.66, all of which, with interest in the sum of $592.82, has been paid as aforesaid, and is retained by the United States. $688.32 was paid to the plaintiff as interest

from December 27, 1921, to June 2, 1922, on the refund of $26,487.97 made in June, 1922, as overpayment on plaintiff's 1918 income and profits tax.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

A so-called tentative return was filed by the plaintiff on March 12, 1919, and as the assessment in controversy was made on March 26, 1924, the plaintiff claims that the five-year period of limitations for the assessment of taxes had [fol. 33] expired, and that the assessment was therefore illegal. The defendant contends that the limitations period did not expire until five years from June 16, 1919, when the completed return was filed, and this presents the first question for our consideration.

The Board of Tax Appeals has consistently held in a number of cases that the filing of the so-called tentative return did not start the running of the statute of limitations. See Matteawan Mfg. Co., 4 B. T. A. 953 . In this conclusion we concur for many reasons which will require a review of the proceedings which lead up to the filing of the tentative return, in order to ascertain its purpose and what was understood with reference thereto by both the Bureau of Internal Revenue and the taxpayer. The "revenue act of 1918," was not approved until February 24, 1919. It was quite plain to everyone that large business concerns and individuals having large business interests would have great difficulty in filing a return within the time required by law, and the Bureau of Internal Revenue would be deluged with requests for extension of time for filing returns. In fairness to the taxpayers, the most of these applications would

have to be granted. The result would be to postpone the payment of taxes in such amount that the Government might become embarrassed for want of revenues, for although the World War was over the Government was still being carried on at an enormous expense. In order to overcome this difficulty a plan was devised which provided the needed funds for the Government and certainly was a valuable concession to the taxpayers who brought themselves within its terms, by granting them an extension of time for filing complete returns. A circular was issued by the commissioner on February 27, 1919, giving the particulars of this plan as follows:

"Income taxpayers, both corporation and individual, were today granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15 to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess-profits returns, provided in every case the taxpayer pays on or before March 15, at least 25% of the estimated amount of the tax due."

It further stated that a supply of blanks for the use of taxpayers would be furnished for making a tentative return, and that the due date for the payment of taxes would not be extended nor would the taxpayer be relied of interest if the amount paid was short of the amount eventually found due. The blank form furnished to and used by plaintiff was headed, "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," and contained no statement whatsoever showing the gross income, deductions, invested capital, or other details necessary for a proper determination of plaintiff's tax liability. It merely estimated the tax to be $80,000.00 and accordingly $20,000.00 was paid on the taxes. It specifically requested an extension of time for filing the "return" and in this connection we are at a loss to understand what return could possibly be meant except the return required by law. The tentative return was not only not required by the law but there was no pro-

[fol. 34] vision in the law for it. It was merely an invention of the commissioner and its purpose was to give the taxpayer an extension of time for filing the return required by law and at the same time obtain the needed funds for the Government. The statute (section 250, act of 1918) provided that the tax shall be assessed within five years "after the return was due or was made." What return? The return not authorized by law and not referred to in the statutes? Clearly not. It was the return which the law required and which was not made by the tentative return. The return on which the statute of limitations is made to depend is the return required by section 23, which is very different from the so-called tentative return. In this connection we have no reference to returns where the taxpayer attempts to comply with the law but through error or mistake does not completely conform to its requirements. We have here a case where there was no pretense as far as making the return was concerned that the law was being complied with. There was merely enough done so that the commissioner would grant the extension of time.

If we look at the matter from the standpoint of equity between the Government and the taxpayer we can come to no other conclusion. The Government had five years in which to make an assessment on a different basis from the return, but surely this ought to be from the time when the taxpayer makes such a return as will enable the bureau to get at least some elementary knowledge as to how much tax he ought to pay. We think no one would contend that the taxpayer could merely file this tentative return and stop there without filing another and completed return but if the contention of the plaintiff is correct and this was a real return in the sense that the word "return" is used in the statute, nothing else was required.

It is argued that if the tentative return was not a return at all but merely an application or an agreement for an extenison of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. This argument overlooks the fact that the whole proceeding was a concession to the taxpayer beyond any requirement of the law, for the commissioner might grant or refuse an extension in his discretion, and having that right he could prescribe the terms on which an extension should be granted. The proposition on the part of the commissioner

was simply that if the taxpayer would file an estimate of his taxes and a request for extension of time for filing a return and make payment of one-fourth the estimated tax, the extension would be granted, and he had a right to make these requirements.

It is also argued that the Government is taking inconsistent positions; that it says at one time that the tentative return was a return and then when its interests require the contrary, says it is no return, but we find nothing inconsistent in its position. It has at no time stated that the so-called tentative return would be considered as the return required by law. On the contrary, the fact that an extension of time was granted for filing a complete return shows very clearly that it did not so consider it, otherwise no extension of time would have been necessary; and while we do not think it is material what the taxpayer understood, we are unable to see how it could have understood otherwise. The only meaning given in the dictionary to the word [fol. 35] "tentative" which would at all apply to the situation under consideration is "experimental," and while this meaning may apply to some features of the case we are inclined to think that the common or colloquial meaning of the word "tentative" in such situations is with reference to something that will do or will answer for the time being but no further.

For the reasons above stated we concur in the view taken upon this question by the Board of Tax Appeals and by the Circuit Court of Appeals in the case of Florsheim Bros. Dry Goods Co. v. United States, 29 Fed. (2d) 895, and hold that the limitation did not begin to run until the completed return was filed and that the tax in question was assessed within the period prescribed by the statute.

Plaintiff also contends that the Commissioner of Internal Revenue having determined the tax liability of the plaintiff in April, 1922, was without authority to revise it, and that his later action making a new assessment was in excess of his authority, and the new assessment was therefore illegal.

We do not think it is necessary to discuss this question at length. The practice of the commissioner in making new and different assessments is of so long standing and has met with such general acquiescence that this in itself constitutes a strong reason rejecting the contention of plain-

tiff. Ever since the Federal income-tax laws have been enacted, this practice has been going on. Congress has not merely acquiesced in it, but by various enactments has recognized the practice and has gone so far as to provide in the revenue act of 1921, which of course was not applicable to this case, a limitation on the reopening of cases. The cases cited by plaintiff with reference to the acts of some official of the Government whose action is by law made final have no application here. The determinations of the commissioner are not binding on the taxpayer but are merely a prima facie regulation. Wickwire v. Reinecke, 275 U. S. 101. The distinction is clearly made in Fidelity & Columbia Trust Co. v. Lucas, 7 Fed. (2d) 146, 149. In Botany Worsted Mills v. United States, 278 U. S. 282, it appeared that the taxpayer filed a return and paid the tax on the basis thereof. Subsequently an additional assessment was made by the bureau and was paid. The implication of the decision, which held the taxpayer could not recover the amount of the additional assessment, was that the commissioner could make changes in the original assessment; and it was expressly so held by the Board of Tax Appeals in Appeal of James Couzens, 11 B. T. A. 1040, a case where the Government officials had fixed the amount of the tax which was paid by the party assessed.

While the tax in question was assessed within the period of limitations it was not collected within the time fixed thereby and if this case is controlled by the rule laid down in Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, the tax involved was unlawfully collected and the plaintiff is entitled to recover. The defendant, however, contends that section 611 of the revenue act of 1928, which was passed subsequent to the decision in the Bowers case, so modifies the rule laid down therein that the court should deny a recovery in the case at bar and this contention presents a complicated question.

[fol. 36] Section 607 of the act of 1928 provides:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto *shall be considered an overpayment* and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." (Italics ours.)

Section 611 provides:

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment *under the provisions of section 607*, relating to payments made after the expiration of the period of limitation on assessment and collection." (Italics ours.)

There can be no question of what these sections mean. In plaintiff's argument it is said:

"Read together these sections provide that taxes assessed or paid out of time shall be credited or refunded to the taxpayer if a timely refund claim is filed *except* in cases of timely assessment made before June 2, 1924, and a claim in abatement was filed and collection of any part of the tax was stayed." With this statement we agree.

But plaintiff insists that they have no application to this case and that if so construed as to deprive plaintiff of the right of recovery herein the sections are unconstitutional.

Further in argument the plaintiff insists that section 611 has no reference to suits on the part of taxpayers and merely defines the authority of the officials of defendant in making refunds of credits. In support of this position it cites the cases of Clinton Iron and Steel Co. v. Heiner, 30 Fed. (2d) 542; Erie Coal and Coke Co. v. Heiner, 33 Fed. (2d) 135; and Gile & Jenks v. Huntley, Collector, 29 Fed. (2d) 209. All of these cases support the contention of plaintiff, but upon careful examination we are unable to agree to the rules laid down therein. In this connection, it should be noted that the case last above cited was reversed by a decision of the Circuit Court of Appeals to which reference will hereinafter be made.

In considering this contention, it should be observed at the outset that it is quite inconsistent with the meaning which is given by plaintiff's counsel to the two sections under consideration and with which meaning, as stated in the quotation from plaintiff's argument set out above, we

agree. Our reasons for differing from these decisions cited by plaintiff are as follows:

It appears to us that Congress, by the provisions in the revenue act of 1928, was endeavoring to establish a rule whereby a condition of repose would be established and when taxes had been paid after the statute of limitations had run but which were due and ought to have been paid by the taxpayer before the expiration of the time of limitations, such taxes could not be recovered by the taxpayer. Whether this general observation may be correct or not, we think it quite clear that the construction of sections 607 and 611 adopted in the decisions cited on behalf of plaintiff is [fol. 37] not correct, and that this will appear from a consideration of the logical effect of such a construction.

As we understand the argument in favor of the rule adopted by these decisions, the reason for the holdings therein is based largely upon the fact that in neither of these sections is there any reference to court proceedings, actions, or suits. But this is not necessary if the specifications made in the statute would make a suit unavailing.

Section 607 specifies the kind and nature of cases in which what is denominated an overpayment may arise by reason of the collection of taxes after the expiration of the period of the statute of limitations although such taxes were originally due and owing by the taxpayer. Section 611 makes an exception to the rule laid down in section 607 and in effect provides, with reference to cases included in this exception, that no "overpayment" shall arise. Necessarily it follows that if demand is made upon the collector for the refund or return of taxes paid after the running of the statute of limitations but which come under this exception, the collector is obliged to say that he is forbidden by law to repay them. It will be observed in this connection that the decisions cited by plaintiff assert that these sections are merely directions to the commissioner, collector, or other officials of the Government and nothing more, and therefore notwithstanding their provisions suit may be brought and maintained to recover the tax. The doctrine laid down by these decisions as to cases which come under the exceptions of section 611 would create a situation that is very peculiar to say the least. If, for example, a demand is made upon a collector for repayment he must say that he is forbidden by law to

make it, but if suit is begun against him for the same thing for which demand was made, it can be maintained and judgment can be entered against him. That Congress intended anything so inconsistent and useless we think no one will contend. When the language of the two sections is considered we think it will be seen there is nothing in them which requires such a construction. True, as before stated, there is nothing said with reference to courts or court proceedings, but court proceedings are not the basis upon which actions are maintained in actions like the one at bar. That depends upon the rights of the plaintiff and its rights are fixed by these sections. If the plaintiff's case came within the provisions of section 611, it had no right to repayment. This makes it necessary for us to consider as to whether its case is in fact included within the provisions of this section.

It is also contended by plaintiff that section 611 applies only to cases of voluntary payment and also to cases where "the collection of any part thereof (of the claim) was stayed," and that the collection of the taxes involved in the instant case was not in fact stayed.

As to the first contention, we think the language of the statute shows clearly that it is not well founded. The section relates to cases where a plea in abatement was filed which in itself would show that the tax was paid unwillingly. This contention also is contrary to the meaning given to the section by the report of the committee which presented the act to Congress, which will be hereinafter set out in connection with the second objection.

The second objection presents a more difficult question and for its proper consideration it will be necessary to [fol. 38] examine that part of the report of the Ways and Means Committee on the revenue act of 1928 which explains the purpose of section 611 and the conditions which it was intended to meet. It is as follows:

"Prior to the enactment of the revenue act of 1924, it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was sup-

posed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new act.

"Your committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and *merely withdraws the defense of the statute of limitations.* If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment." (Report No. 2, 70th Congress, 1st session, p. 34.) (Italics ours.)

A reading of this excerpt from the report leaves no possibility of doubt about the intent and purpose which Congress undertook to embody in section 611. As before stated, the statute only applies to cases where the taxpayer had paid, after the running of the statute of limitations, taxes which had been rightfully due and owing to the Government. There is no equity in a claim for the refund of such taxes in any event, but the statute restricts the Government in retaining them to those cases only where as a favor to the taxpayer the Government had permitted the filing of a plea in abatement and collection was stayed; or in other words, to those cases where the taxpayer by filing a plea in abatement had succeeded in delaying the case over the period of limitations and then sought to take advantage of the favor that had been granted him.

The argument made by the plaintiff is that during the period under consideration there was no provision for a plea in abatement in the law and especially that there was nothing in the plea of abatement that would, under the law, in any event operate as a stay upon the collection of the tax. This may be admitted, but if the statute applies only to taxes the collection of which was stayed by the plea in abatement it becomes a practical nullity, for it could only apply [fol. 39] to a small number of cases arising under the act of 1924, which provided for the filing of a plea in abatement and bond to stay proceedings, if indeed it had any application at all. The language of section 611 and the statement made in the report, we think, forbid any such construction. The section is not limited to cases where the collection is stayed by the filing of a plea in abatement, but simply to cases where the collection "was stayed," and we think the words "was stayed" were purposely used instead of "is stayed." Congress intended the act to apply to the conditions set out in the report showing that in numerous cases taxpayers had filed claims in abatement and delayed the collection until the claim in abatement could be acted upon. In this case the collector, in March, 1924, demanded payment of the tax in controversy and the plaintiff filed a plea in abatement, whereupon nothing more was done until February, 1925, when the commissioner passed on the claim in abatement and allowed it in part, of which the plaintiff was notified, and in March of the same year plaintiff filed an appeal from the deficiency fixed by the last determination to the United States Board of Tax Appeals. No further action was taken by the collector until June, 1925. It thus appears that plaintiff was granted a stay upon filing the plea in abatement. The word "stay" as used in ordinary conversation means to hold from proceeding, to postpone, or to keep back. In law, it generally means to suspend by judicial proceedings. We think it was not used in the statute in its strict legal meaning but in its ordinary sense and when we give it that meaning it is quite clear that the collection was stayed by the collector or commissioner, and there can be no doubt but that in so holding we are following the intention of Congress as expressed in the report to that body which explained the meaning and purpose of sec-

tion 611. To put the construction on the statute contended for by plaintiff requires us to attribute to Congress the absurdity of declaring that unless a stay was brought into effect by an act which did not and could not produce a stay, the statute would not operate and thus the statute would nullify itself. It needs no citations to show that it is our duty to so construe the statute as to give it some force and effect, when this can be done consistently with its language. The construction given, in our opinion, not only accords with the language used, but is the only construction that could properly be given.

These conclusions are supported in part, if not entirely, by the opinion rendered in the case of Clyde G. Huntley, Collector, v. H. S. Gile and W. T. Jenks by the United States Circuit Court of Appeals for the ninth circuit, 32 Fed. (2d) 857, reversing Gile and Jenks v. Huntley, 29 Fed. (2d) 209, cited by counsel for plaintiff; and also the case of Regla Coal Company v. Bowers, decided by the District Court, Southern District of New York, November 13, 1929, C. C. H. D— 9415, p. 8888. The decision in the case last cited contains an elaborate discussion of the proper construction of sections 607 and 611 and the Constitutional question raised in connection therewith. On all of these matters the same conclusion is reached as is set forth in this opinion. In the Huntley case, supra, attention is called to the fact that if it be held that the statutory provisions have no application to taxes collected after the period of limitations [fol. 40] has expired, the statute is useless and meaningless. There would of course be no occasion or use whatever for the statute in cases where the tax was collected prior to the expiration of the period of limitations. The only reason for enacting the statute in question was the fact, as shown by the report of the committee, that "amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run." It is quite evident that the intention of the lawmakers was that the statute should apply to taxes collected after the statute of limitations had run.

Objection has been made that the construction contended for by defendant is retroactive and that a statute ought not to be construed as having retroactive application unless it appears that Congress had such intent. The provisions of the statute under consideration are retroactive in form and

if anything further is needed to show the intent of the legislative body enacting it, it will be found in that portion of the report accompanying the act of 1928 which has already been set out in this opinion. The report makes it clear that the sole purpose of the provision was to obviate the effect of the decision in the case of Bowers v. New York & Albany Lighterage Co., supra, and to apply to cases arising under prior acts.

One other point remains to be decided. It is further contended that if the statute is construed in accordance with our holding, it is unconstitutional and invalid for the reason that it would deprive plaintiff of a vested right. If plaintiff acquired such a right, it was by virtue of the statute of limitations. In Huntley v. Gile and Jenks, (C. C. A. 9th Dist.) supra, it is said, "no vested right accrues to the taxpayer out of the running of the period of limitation for the collection of a valid tax," citing Rafferty v. Smith, Bell & Co., 257 U. S. 226; United States v. Heinszen & Co., 206 U. S. 370; Collector v. Hubbard, 12 Wall. 1; Haight v. United States, 22 Fed. (2d) 367; Campbell v. Holt, 115 U. S. 620; Railroad Co. v. Alabama, 101 U. S. 832; Beers v. Arkansas, 20 How. 527; West Side Co. v. Pittsburgh Co., 219 U. S. 92; Brushaber v. U. P. R. R. Co., 240 U. S. 1; Lynch v. Hornby, 247 U. S. 339, 343.

These authorities would seem to dispose of the point last considered, but before concluding attention is especially directed to another rule which, in our opinion, effectually precludes this court from considering plaintiff's claim.

Nothing is better settled than the principle that the legislative branch of the Government has complete right and authority to determine when, how, and where the Government shall be sued and whether it can be sued at all. If Congress sees fit to provide that a suit can not be maintained for taxes paid, it is clear (at least where the taxes were rightfully imposed) that they can not be recovered. "Where a statute creates a right and provides a special remedy, that remedy is exclusive." United States v. Babcock, 250 U. S. 328, 331. The constructions which we have heretofore put on sections 607 and 611 of the revenue act of 1928, specify in what cases suits may be maintained to recover taxes paid which in their origin were valid and due from the taxpayer. If we are correct in this, then by clear implication only such suits as are permitted by these two

sections can be maintained on the ground that the tax had been paid after the running of the statute of limitations, and [fol. 41] that such was the intention of Congress we think admits of no doubt. As we find that plaintiff's claim does not belong to a class for which suit may be brought, this Court has no authority or jurisdiction to approve it, regardless of whether the rights of the plaintiff had vested or not.

It follows that the petition of the plaintiff must be dismissed and it is so ordered.

Williams, Judge, and Littleton, Judge, did not hear and took no part in the decision of this case.

Graham, Judge, and Booth, Chief Justice, concur.

[fol. 42] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 2nd day of December, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $32.14.

By the Court.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On January 24, 1930, the plaintiff filed a motion for a new trial.

On February 17, 1930, the following opinion of Green, J., and concurring opinion by Littleton, J., on the plaintiff's motion for a new trial, were filed:

[fol. 43] VII. Opinion of the Court by Green, J., on the Plaintiff's Motion for New Trial and Concurring Opinion by Littleton, J.—Filed February 17, 1930

Supplemental Opinion on Motion for New Trial

Green, Judge, delivered the opinion of the court:

On the submission of this case it was contended by counsel for plaintiff that the tax in this case having been determined under the so-called relief provisions of sections 327 and 328 of the act of 1918, the matter of the amount of the tax was governed by the discretion of the commissioner in applying these provisions, and that having once determined the amount, he could not by a second and later determination increase the amount which he had originally fixed for the tax, and as the matter was within the discretion of the commissioner his original determination was final and conclusive both upon him and this court. It is now urged by brief in argument on the motion for a new trial that this point receive further consideration, and as there are other cases on the docket involving the same question, it has been thought best to file this opinion supplemental to the one heretofore rendered.

At the outset, to avoid confusion of thought, it should be kept in mind that the question under consideration is not whether the commissioner's action under the sections of the law above referred to is reviewable by this court. That question was settled by the Williamsport Wire Rope Co. case, 277 U. S. 551, wherein it was held that this court had no jurisdiction to review his decision in such cases. The question in the case at bar is whether the commissioner had authority to redetermine, change, or modify his original determination or reassess an additional amount against the plaintiff. Counsel for plaintiff, however, taking the Williamsport Wire Rope Co. case, supra, as the basis for his argument, contends that the action of the commissioner was final and for that reason could not be changed even by himself when once it was made. It would seem a rather surprising doctrine that if the commissioner discovered the next day or the next month that he had made a gross error that he had no authority to correct it, but for reasons

hereinafter stated we shall not discuss this point. Plaintiff's counsel cites a number of cases which he claims hold that when a tribunal or an official is authorized to act with [fol. 44] discretionary power, when that authority has once been exercised, no further authority exists; and that where lawful authority is delegated to an administrative officer, his acts in an administrative way are not subject to change or review. For the purposes of the argument, it may be conceded that where the acts of the officer are administrative in their nature a different principle prevails with reference to the review thereof than when he acts in a quasi-judicial capacity. Nevertheless, it is uniformly held that the decisions of such tribunal or officer may be set aside on the ground of fraud or mistake, and it has also been held that an administrative officer whose decision is conclusive upon the courts may review and change his original decision, provided that no rights have become vested such as would arise from the issuance of a patent, a certificate, or something of that nature. Love v. Flahive, 205 U. S. 195, 199. Plaintiff also contends that in such event the burden of proof is upon the party seeking to have the decision changed to establish the fraud or mistake, and that even then it can only be done by a court and not by the officer or tribunal itself. The cases cited to support this rule would seem to show that it only applies when the Government is seeking to set aside the act of one of its own officials. In Austin Co. v. Commissioner of Internal Revenue, 8 B. T. A. 628, affirmed 35 Fed. (2d) 916, this particular question was involved in a case of the same nature as the one before us. With reference to the additional assessment made by the commissioner, the court said:

"There as a presumption that he performed his duty." (Citing United States v. Chemical Foundation, 272 U. S. 1.)

And with reference to the claim that the commissioner lacked authority to make any further assessment, the court also said:

"Even though there was lack of authority to make such assessment upon a changed view of the same facts, there was not lack of authority to make it where there was fraud or mistake of law or fact in the original assessment.

In this situation the burden was on the petitioner to show that the commissioner's action grew out of circumstances which did not warrant it."

But it would require too much time and space to review the decisions recited on behalf of plaintiff, and we do not think it necessary to analyze them for the reason that in our opinion they have no application whatever to the case at bar, and we can rest our decision firmly on other grounds. Our reasons for this holding are set out below.

A full consideration of the question now under consideration requires that we should go somewhat into the history of the income and profits tax system in force at the time when the tax in question was assessed. The first experience of this country with an income tax was at the time of the Civil War and for a short period thereafter. During that period the rates of the tax compared to those now in force were very low and the administrative provisions of the law were few and simple. The recovery of an amount overpaid could only be obtained in the same manner as an overpayment of any other tax, that is, when the payment had been made under protest and suit brought to recover the amount overpaid. This income tax law was repealed and finally adjudged unconstitutional. In 1913, the Constitution having been amended, another income tax law was placed upon our statute books. Here [fol. 45] again, the rates were comparatively speaking, quite low, the administrative provisions few and simple, in no case was the act of the commissioner discretionary, and no changes were made in the method of obtaining refunds in proper cases. After this country became involved in the World War it became necessary to greatly increase the rates of income and profits taxes, which was done first by the act of 1916 and then by the act of 1918, under which the taxes in question in this case were levied. It became evident—in fact, was a matter of common knowledge—that the application of these high rates through a tax with which neither the Government officials nor the citizenship of the country were familiar gave rise to numerous errors, inequalities, and hardships, both in favor and against the taxpayers, which called for action by Congress. The result was that an entirely new body of laws was

built up under which, while the administrative proceedings were in part governed by authorized Treasury regulations, for the most part they were ordered and directed by statutes in a manner which compared to the methods theretofore existing may be said to be exceedingly specific. These statutory provisions applied to the income and profits taxes. To what extent they applied to other taxes it is not necessary for us to herein determine. The special object and purpose thereof was to make clear and plain, so far as possible, the procedure in admintering the income and profits taxes, and they are to be found in connection with the revenue acts which imposed them. These acts made great changes in the proceedings for the assessment and collection of taxes and also for the refund of taxes erroneously or wrongfully collected. For the first time they provided for limitations upon the assessment and collection of taxes, for the refund of taxes although no protest had been made when they were paid, and eventualy gave the right to have the question of the taxpayer's liability judicially determined without having first paid the tax. So also while Congress was thus making the path of the taxpayer easier and more definite, it prescribed limitations on his right to object to assessments and claim refunds. It was also important that the Government as well as the taxpayer should be protected from errors and mistakes that might enter into the assessment and collection of taxes.

The ultimate question in the case is not whether the decision of the commissioner was final, but when it became final; and that, as we shall see, was only when the statute of limitations had run against the Government. With the evident purpose of making it clear when the decision of the commissioner became final, Congress, in the act of 1921, included a comprehensive and sweeping provision applying to all cases under the income and profits taxes with reference to the time when a case was finally settled, showing definitely when assessments made by the commissioner became final, so that no further action could be taken. As the assessment which plaintiff claims was final was not made until 1922, this provision unquestionably applied thereto. It is found in a separate title of the act, headed in manner and form as set out below:

"Title XIII.—General Administrative Provisions"

This major division was also subdivided, and in one of these subdivisions we find section 1312 of the same act which, in our opinion, clearly controls the judgment in this [fol. 46] and similar cases. This section with its subhead is set out below in exactly the form that it appears in the act as passed by Congress:

"Final Determinations and Assessments

"Sec. 1312. That if after a determination and assessment in any case the taxpayer has without protest paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States."

This section (1312) appeared for the first time in the 1921 act but was repeated verbatim et literatim under the same title and subhead in the revenue acts of 1924 and 1926 except that the words "without protest" are omitted. We think this statute so plain that "he who runs can read." A taxpayer had only to look at these headings to find under the head of "final determinations and assessments" whether the assessment which had been made against him was final. In Holmquist v. Blair, 35 Fed. (2) 10, the court said with reference to this provision:

"Section 1312 provides that, where the commissioner has determined and assessed the tax and without protest it has been fully paid or a refund accepted and a written

agreement entered into by the commissioner and the taxpayer (approved by the Secretary), 'such determination and assessment shall be final and conclusive' except for fraud, malfeasance, or misstatement of material fact. Sections 1309 and 1312 leave no doubt of the authorized power in the commissioner to make reexaminations, redeterminations, and reassessments. From the above sections of the act it is clear that Congress authorized reexaminations by the commissioner, and that the only limits thereon are that such must be made within four years (section 250 (d)) and must be after written notice to the taxpayer after investigation of the necessity for such reexaminations. Section 1312 points out the way and the only way in which an assessment may be made final before expiration of the four-year period. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' Botany Mills v. United States, 278 U. S. 282, 289."

Section 1309 referred to reexaminations.

In the same decision, Woodworth v. Kales, 26 Fed. (2d) 178, is reviewed and doubt is expressed as to whether, under the particular facts in the case, a contrary doctrine is held therein, but the court in its opinion says with reference to the case last cited that it prefers the rule laid down in Loewy & Son, Inc., v. Commissioner, 31 Fed. (2d) 652, in which the same construction is placed upon section 1312 of the revenue act of 1921.

[fol. 47] We do not overlook that in Holmquist v. Blair, supra, and Loewy & Son v. Commissioner, supra, the assessment was not made under an administrative provision, but the line of argument used in the decisions is equally applicable to the case at bar. It should be noted also that in the Austin Co. case, supra, the assessments were made under a provisions of the act of 1917 similar to the so-called relief provisions of the act of 1918 under which the assessments were made in the case at bar, and the act of the commissioner was therefore administrative, but the right of the commissioner to make a second assessment was upheld.

If it be claimed that prior to the passage of this provision of the law the first determination of the tax by the

commissioner under the relief provisions was final, this affords no reason for such cases not being included within the purview of the section under discussion if Congress intended to exempt them from its provisions, but rather furnishes a conclusive argument that Congress did not so intend. Assuming for the purpose of the argument that prior to the passage of section 1312 such acts have been final, it makes it the more evident that if Congress had intended that this rule should continue, it would have so stated in this section which was three times enacted, and which we might say assumed by everyone to be all inclusive in its provisions. All the works on income taxation so treat it, and this has been the practice followed by the department, which has repeatedly reviewed its decisions upon special assessments under the relief act, upon the request of taxpayers.

It is said that when the commissioner determined the tax under the relief provisions of the act of 1918, and not only found that the plaintiff had been overassessed but sent the plaintiff a check for the amount of the overassessment, which plaintiff accepted, the whole matter was then settled. But section 1312 provides for exactly this kind of a case, and that such a settlement is not final unless an agreement is made in writing between the taxpayer and the commissioner as provided therein.

It should also be noted that in section 273 of the revenue acts of 1924 and 1926 Congress provided that the commissioner might reverse his action in the case of an abatement, refund, or credit and reassess and collect the amount. It expressly recognizes that in arriving at the correct tax to be collected there may have been additional assessments or collections, abatements, refunds, and credits and clearly indicates that a refund, erroneous or otherwise, does not bar action by the commissioner within the satutory period provided by law. An amount erroneously refunded becomes none the less a tax because of that fact.

Since the submission of the case at bar, we have been favored with further argument on this same question in the case of Taft Woolen Co. v. United States, No. J-61. In the brief on the case last cited, attention is called to provisions of section 204 (b) and 234 (a) (8) of the rev-

enue act of 1918 which, it is said, were reenacted in the revenue act of 1921, and that there would be no necessity for these provisions, which are general in their nature, being enacted if the commissioner had power otherwise to redetermine the tax in all cases. There might possibly be some force in this argument if the particular provisions of these two sections had been reenacted in their entirety. [fol. 48] Such is not the case. The part of these provisions which had general application, namely, the words "the taxes imposed by this title and by Title III," was omitted and other changes made when the sections to which reference is made were reenacted in the act of 1921, doubtless for the reason that Congress was making express provision elsewhere with reference thereto in section 1312 of the same act which we have set out above. As changed in the act of 1921, these provisions apply only to particular cases and state that in such cases the commissioner not only may reexamine the return, as he could in all other cases, but that he "*shall*" do so in certain instances. (Italics ours.) Also, in the argument in the Taft Woolen Co. case, supra, reference is made to sections 222 (a) and 222 (b) of the act of 1918 which it is said were reenacted in the act of 1921. An examination thereof will show that these provisions applied to amounts claimed by credits by the taxpayer by reason of taxes paid in foreign countries, or to refunds received therefrom and to nothing else. It was clearly necessary that a special provision should be made with reference thereto in a separate paragraph. It is also said that a Treasury regulation prevented the reopening of a case under circumstances such as existed in the case at bar, but a casual examination of the Treasury regulation with reference to the reopening of cases makes it plain that it applied only to cases where the taxpayer was making application to have the case reopened.

For the reasons above stated we hold that the commissioner was not precluded from making a reassessment within the period prescribed by the statute of limitations, which in this case had not expired. It follows that the motion for a new trial must be overruled and it is so ordered.

Williams, Judge, and Booth, Chief Justice, concur.

Concurring Opinion

Littleton, Judge, concurring:

On the theory that the court has jurisdiction to go into the question of the authority of the commissioner to reconsider a determination made by him under sections 327 and 328 and change his first determination and reassess and collect a portion of the profits tax theretofore determined under these sections, and refunded, I agree with the foregoing opinion and the conclusion reached therein, but I think the claim of the plaintiff should be denied on the ground that the court is without jurisdiction to pass upon the question of the authority of the commissioner in this case.

This case relates entirely to a matter arising under the special-assessment provisions of the statute which confer discretionary power in the commissioner to determine the facts and the rate of profits tax through a comparison of the plaintiff with other corporations specified in section 328. It apears that the plaintiff made a return for the year 1918 and paid a total income and profits tax of $91,944.37. This return showed a total net income of $124,488.61, the normal tax upon which was $4,156.30 and the excess-profits tax, as computed under section 301 of the revenue act of 1918, was $87,836.07. Thereafter plaintiff made application to the commissioner for computation of its profits tax under section 328 of the said act, known as the special-assessment provision, claiming that the profits tax of $87,836.07 paid was too high and worked upon the plaintiff an exceptional hardship as compared with other corporations similarly circumstanced. The commissioner, [fol. 49] in his discretion, concluded that this application should be granted, whereupon he made a computation under the special-assessment sections and on June 21, 1922, increased the net income of the plaintiff to $126,219.28, but concluded that the excess-profits tax, when determined under section 328, should be $87,736.39 instead of $87,836.07. As a result, $96,487.97 of the profits tax paid on the return was refunded. In March, 1924, the commissioner reconsidered his action taken under the special-assessment provisions and made another determination

of the amount of plaintiff's profits tax under these provisions by comparison with other corporations and concluded that he had made a mistake; that the correct comparison and computation showed a profits tax of $73,368.23 and that, as a result, he had refunded $13,756.02 too much. No change was made in the net income. He recomputed and reassessed this amount and upon receiving notice thereof the plaintiff filed an abatement claim and a brief. Upon further consideration the commissioner made a further comparison under the special-assessment provisions and upon a further recomputation allowed the abatement claim for $6,354.76 and rejected it for $7,410.26. In August, 1925, the collector made demand for the payment of the last-mentioned amount, and in September, 1925, the plaintiff paid it, together with interest in the amount of $592.82. In this suit plaintiff asks judgment for the amount upon the ground that the commissioner's action on June 21, 1922, under the special-assessment provisions refunding a portion of the excess-profits tax shown upon the return, was final and that he was without authority to reassess and collect any portion of the amount so refunded.

To go into the question whether the commissioner had authority to change his determination and reassess a portion of the tax refunded under the special-assessment provisions would be the same as inquiring into the correctness of such determination. The amount which the commissioner finally determined the plaintiff owed was less than the tax imposed by section 301. The entire matter was embraced within the provisions of section 328. Plaintiff claims that the amount refunded lost its character as a tax and could be recovered only by a suit in which it would be incumbent upon the Government to prove that a refund was erroneous. In such a situation the court would not have jurisdiction to go into the matter. Williamsport Wire Rope Co. v. United States, 277 U. S. 551. And, however egregious the mistake in the first determination might have been, no portion of the amount erroneously repaid could be recovered by the Government.

Graham, Judge, concurs.

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,011. Court of Claims. Term No. 880. Oak Worsted Mills, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed May 7, 1930. File No. 35,011.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted, the briefs and argument to be limited to the question of the validity and effect of Sec. 611, Revenue Act of 1928, and the case is advanced to be heard immediately following No. 761, Percival E. Magee vs. The United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
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MAY 21 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 104

OAK WORSTED MILLS, PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

THEODORE B. BENSON,
Counsel for Petitioner.

Of Counsel
GUIL. BARBER,
WILLIAM MEYERSOHN.

(35,011)

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929

No. 880.

OAK WORSTED MILLS, PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion of the Court Below.

The opinion of the Court of Claims has been officially reported in 36 F. (2d) 529, and will be found printed at R. 32–44. Petitioner filed a motion for new trial and a supplemental opinion was rendered which has been officially reported in 38 F. (2d) 699, and will be found printed at R. 45–54.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3(a) of the Act of February 13, 1925 (43 Stat. 936).

The final judgment of the Court of Claims was entered on February 17, 1930 (R. 44). Application for writ was presented May 7, 1930.

The suit brought in the Court of Claims is for the recovery of corporation income and profits taxes erroneously and illegally assessed and collected, jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

The Facts.

The facts of the case are printed in the petition (R. 1–2) and to avoid repetition counsel begs leave to refer to those pages which contain the shortest and plainest statement that he has been able to make.

IV.

The Statutes Involved.

The statutes involved in this case are printed in the petition (R. 2–4) and to avoid repetition counsel begs leave to refer thereto.

V.

Specification of Errors to be Urged.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the review and reversal of the decision of the Court of Claims are:

1. The court below erred in holding that the Commissioner of Internal Revenue once having exercised a discretion and judgment invested exclusively in him by an Act of Congress and having determined and refunded an overassessment of tax, had authority to thereafter review the same facts and reach a different conclusion.

2. The court below erred in holding that the determination of the tax by the Commissioner of Internal Revenue under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was merely prima facie and not conclusive.

3. The court below erred in failing to hold that once having computed the profits tax on the basis of comparatives selected in the exercise of the discretion conferred on him by the provisions of Section 328 of the Revenue Act of 1918 and having issued a certificate of overassessment and made the refund of the overpayment, the judgment of the Commissioner of

Internal Revenue was final and conclusive and was thereafter not subject to review.

4. The court below erred in failing to hold that under the provisions of the Revenue Act of 1921 the Commissioner of Internal Revenue was precluded from making the reassessment, as an additional assessment to correct an alleged excessive overassessment previously determined, where the entire amount of the tax imposed by statute had once been assessed and paid.

5. The court below erred in failing to hold that the Commissioner of Internal Revenue in assuming to decide that his previous determination of the profits tax under Section 328 was erroneous and in recollecting an amount theretofore paid usurped the functions of the judiciary in violation of Article III, Section I, of the Constitution and took the petitioner's property without just compensation in violation of the Fifth Amendment.

6. The court below erred in holding that Section 611 of the Revenue Act of 1928 is applicable to this case.

7. The court below erred in holding that Section 611 deprived the Court of Claims of jurisdiction in this case.

8. The court below erred in failing to hold that the petitioner's remedy under Section 3226 of the Revised Statutes was not affected by Section 611 of the Revenue Act of 1928.

9. The court below erred in failing to hold that the application of Section 611 to this case would render that section unconstitutional.

10. The court below erred in failing to hold that on the expiration of the five-year period of limitation in Section 250 (d) of the Revenue Act of 1921 the petitioner's liability for taxes, if any, expired.

VI.

The Argument.

Summary of Argument.

A. The determination by the Commissioner of Internal Revenue of the profits tax under Sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined.

B. The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined.

C. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The jurisdiction of the court below is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor within the exceptions thereto in Section 611 of the same Act.

2. The provisions of Section 611 are not to be construed to be retroactive to apply to this case.

3. In this case no internal revenue tax was legally assessed within the meaning of the provisions of Section 611.

4. The amount in controversy is not an internal revenue tax within the meaning of Section 611, because the entire tax imposed by statute had already been assessed and paid.

5. In this case no claim in abatement within the meaning of Section 611 was filed. The claim was not in abatement but in bar of the right of the Commissioner to make the re-collection.

6. The collection of no part of a tax was ever stayed by a claim in abatement or otherwise.

7. The amount in controversy was paid under protest.

8. The petitioner and the Commissioner did not enter into a statutory consent in writing for a later determination, assessment or collection of any tax beyond the statutory period as provided in Section 250 (d) of the Revenue Act of 1921.

D. The application of Section 611 of the Revenue Act of 1928 to this case would render it unconstitutional for the following reasons:

1. The power conferred on Congress by the Sixteenth amendment is limited to the laying and collecting of taxes on incomes.

2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

The Argument.

A. *The determination of the profits tax by the Commissioner of Internal Revenue under the provisions of sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined.*

A principle of law that this Court has uniformly upheld is that, where an administrative officer vested by an Act of Congress with exclusive jurisdiction of a matter involving administrative discretion and judgment has once reached a conclusion which has been communicated agreeable to the requirements of law, his decision is final and is not subject to reexamination.

This principle has been recognized in the following cases: *Ex parte Randolph*, 2 Brock (U. S.) 447; *United States* v. *Bank of Metropolis*, 15 Pet. 377, 40 U. S. 240; *West* v. *Standard Oil Company*, 278 U. S. 200, 49 S. Ct. 138. This principle was stated by Mr. Justice Baldwin in *United States* v. *Arredondo*, 6 Pet. 691, 729–730, as follows:

"* * * It is a universal principle, that, where power or jurisdiction is delegated to any public officer or

tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise * * * are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive * * * legislative * * * judicial * * * or special * * * unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law. * * *"

The question here involved is whether this principle applies to the Commissioner of Internal Revenue in the exercise of that discretion, which this Court in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 48 S. Ct. 587, held was conferred upon him exclusively by Sections 327 and 328 of the Revenue Act of 1918 to select comparatives for the computation of the profits tax and from the exercise of which discretion it was held no appeal was provided.

In this case the Commissioner determined that the petitioner came within the provisions of Section 327 and that it was entitled to have the profits tax computed under the provisions of Section 328.

After having determined that the petitioner was so entitled the Commissioner in June, 1922, computed the profits tax on the basis of certain comparatives selected by him and actually made a refund on the basis of such comparatives. Subsequently and during March, 1924, and without reversing his previous position as to the fact that petitioner's case fell within the scope of Section 327 of the Revenue Act of 1918, and that the tax should be computed under the provisions of Section 328 of said Act, the Commissioner undertook to reinvoke the discretion which he had already exercised and proceeded to recompute the profits tax by *choosing* from his files and substituting different comparatives showing a greater average rate of excess profits tax which resulted in the increase

of petitioner's taxes. In this case there is no fact controversy.

The question that the petitioner seeks to have this Court pass on is the right of the Commissioner of Internal Revenue to reexercise the discretion vested exclusively in him to select comparatives for the computation of the profits tax. Under the decision in the *Williamsport Wire Rope Co., supra*, this discretion is held to be vested solely in the Commissioner and his determination thereunder is not subject to question in a case like this where no appeal can be taken to the Board of Tax Appeals.

The petitioner submits that the decision of the court below, that the exercise of discretion by the Commissioner is not final, is erroneous and should be reversed. The question involved is of public importance for the reason that there are a number of other cases pending which involve the same question and for the further reason that if the decision of the court below is not reversed it will mean the Commissioner can reopen any case in which the statute of limitations has not run. The question here involved is one of importance and calling for the exercise of this Court of its supervisory powers over the Court of Claims.

B. *The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined.*

The powers possessed by the Commissioner of Internal Revenue are such only as are conferred on him by Congress. At the time he assumed to make the reassessment here in question the Revenue Act of 1921 was in force and is controlling, *Russell* v. *United States*, 278 U. S. 181, 49 S. Ct. 121. The authority of the Commissioner to assess and collect taxes under such Act is that conferred by Section 250, subparagraph (b) of which defines a deficiency and authorizes the Commissioner to assess a deficiency or to refund an overpayment and subparagraph (d) provides the manner in which the Commissioner may make the assessment of a tax or a deficiency and provides

for its collection. Subparagraph (b) defines a deficiency as the excess of the amount "which should have been paid" over "the amount already paid." Subparagraph (d) authorizes the Commissioner to make an assessment where "a tax or a deficiency in tax is discovered." Under the statute the authority of the Commissioner to make an assessment is limited to the discovery of a tax or a deficiency. In the present case the full amount of the greatest possible tax was assessed at the time of the filing of the return and was paid during the year 1919. There was, therefore, no tax or deficiency in tax which had not already been discovered, assessed and paid. There was no tax or deficiency "which should have been paid." In a similar case, *Kelley* v. *United States*, 30 F. (2d) 193, the Circuit Court of Appeals for the Ninth Circuit stated:

> "There was some discussion on the argument as to the meaning of a deficiency as defined in the revenue laws, but the entire tax imposed by the government was paid, and, if there was no tax, there could in the nature of things be no deficiency."

The petitioner concedes that the Commissioner has authority to make an assessment of an additional tax, for such constitutes a deficiency within the meaning of Section 250 (b). In this case, however, there was no additional tax or deficiency in tax, but the Commissioner attempted to make an additional assessment to correct an alleged erroneous overassessment previously determined. The law provides for the assessment of an additional tax not previously assessed, but not for the additional assessment of a tax previously assessed and paid. Therefore, the petitioner submits that the Commissioner exceeded the authority conferred on him by statute.

This Court in the *Russell* case, *supra*, held that an assessment made prior to June 2, 1924, was controlled by the provisions of the Revenue Act of 1921 and not by the provisions of the Revenue Act of 1924. The court below failed to follow the decision in that case and took the position that the definition of a deficiency to be applied is that found in Section 273 of

the Revenue Acts of 1924 and 1926. In the course of its supplemental opinion, the court below stated:

> "It should also be noted that in section 273 of the revenue acts of 1924 and 1926 Congress provided that the commissioner might reverse his action in the case of an abatement, refund, or credit and reassess and collect the amount. It expressly recognises that in arriving at the correct tax to be collected there may have been additional assessments or collections, abatements, refunds, and credits and clearly indicates that a refund, erroneous or otherwise, does not bar action by the commissioner within the statutory period provided by law. An amount erroneously refunded becomes none the less a tax because of that fact."

The holding of the court below that the definition of a deficiency to be applied to this case is that found in Section 273 of the Revenue Acts of 1924 and 1926 is clearly contrary to the decision of this Court in the *Russell* case, *supra*, and to the clearly expressed provisions of Section 280 of the Revenue Act of 1924 and Section 283 of the Revenue Act of 1926.

In addition to holding that the provisions of Section 273 of the Revenue Acts of 1924 and 1926 applied to this case the court relied on the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Austin Co.* v. *Commissioner*, 35 F. (2d) 910, certiorari denied March 17, 1930, in which case there was a deficiency in tax, as defined by the Revenue Act of 1924 and the case came within the jurisdiction of the Board of Tax Appeals under the provisions of the Revenue Act of 1926. In the present case there was no deficiency. The provisions of the Revenue Acts of 1924 and 1926 do not apply. The Board of Tax Appeals dismissed the petitioner's appeal.

The Act of 1921, which is applicable to this case, provides for the assessment and collection of a tax and for the refund of an overpayment, but petitioner submits that when a tax has once been paid there can be no further liability for taxes and a refund does not restore the tax and that a refund is not subject to recall as a tax. If recoverable at all it is recoverable as a sum illegally paid out of the Treasury and by resorting

to the courts. In *United States* v. *Bank of Metropolis*, 15 Pet. 377, *supra*, the Court at page 401 stated:

> "But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given, * * *"

The Circuit Court of Appeals for the Ninth Circuit in *Kelley* v. *United States*, *supra*, stated:

> "* * * When once paid, a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.' Cooley on Taxation, 3rd Ed., p. 810. From this view, we know of no dissent."

In *Talcott* v. *United States*, 23 F. (2d) 897, certiorari denied 277 U. S. 604, 48 S. Ct. 601, the Circuit Court of Appeals for the Ninth Circuit held that an amount refunded could be recovered not as a tax but as a sum erroneously paid out of the Treasury and in passing on the counter-claim filed in the case the court stated: "the counter-claim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States."

If the principle applied in the *Kelley* and *Talcott* cases, that a tax once refunded is not recoverable as a tax but by suit by the United States, is correct, then the court below erred in this case. The United States prevailed in the *Talcott* case and succeeded in recovering, after the statute of limitations for assessment and collection had expired, an estate tax illegally refunded under the decision of this Court in *United States* v. *Robbins*, 269 U. S. 315, 46 S. Ct. 148.

There is a direct conflict between the decision in this case and the decisions in the *Kelley* and *Talcott* cases and the writ should be granted for that reason.

Illegal refunds or refunds made by the Commissioner of Internal Revenue acting without the scope of his authority could, under acts prior to 1928, be recovered by the Government in a counterclaim or other appropriate suit in court, but where a refund was made by the Commissioner acting within the scope of his authority and later alleged to have been erroneous, there was no remedy provided by statute. The 1928 Revenue Act, however, has remedied this situation, by the enactment of Section 610 of said Act, which reads, in part, as follows:

> "(b) Any portion of an internal-revenue tax * * * which has been erroneously refunded * * * may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later."

It is submitted that had the Commissioner the authority, assumed in the instant case, to reassess at will or that there was any provision in the law for the recovery of an alleged erroneous overassessment, there would have been no occasion for the enactment of the provisions of Section 610.

C. *The Provisions of Section 611 of the Revenue Act of 1928 do Not Apply*

AND

D. *Section 611 if Construed to Apply Would be Unconstitutional.*

The decision of the court below with reference to the provisions of Section 611 of the Revenue Act of 1928 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *Burden, Smith & Co.*, 33 F. (2d) 229.

This Court on March 3, 1930, granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on the petition of *Graham & Foster, Co-partners, etc.* v. *Goodcell, Collector*, No. 589, October, 1929, Term, to review the decision of that court with reference to the application and constitutionality of Section 611 of the Revenue Act of 1928. The application and constitutionality of Section 611 are also

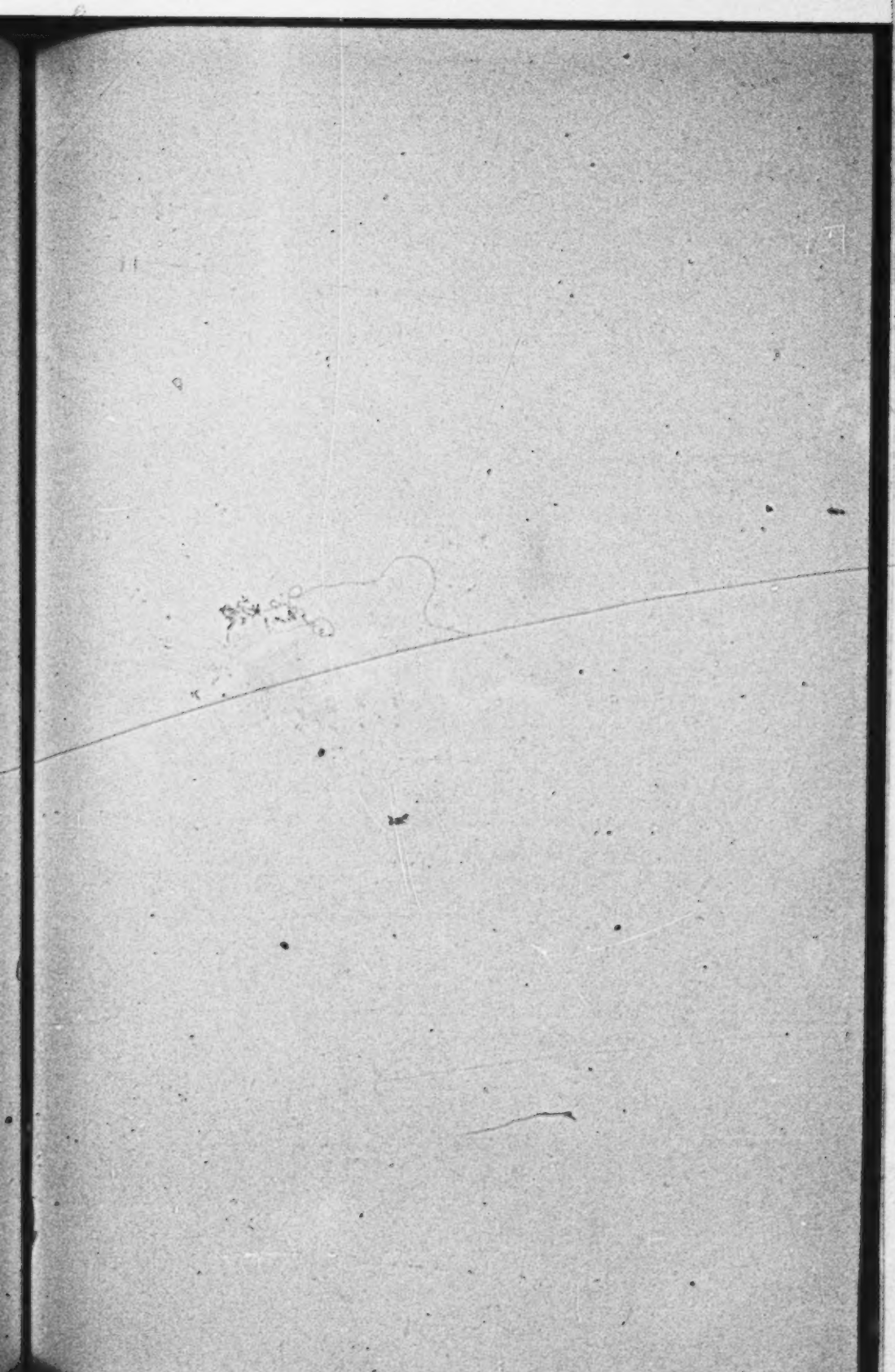
presented in the petition in this case and counsel submits that the same reasons exist for the allowance of the writ as were presented to the court in the petition of Graham & Foster, Co-partners, etc. The application for the writ in the *Graham & Foster* case was not opposed by the Attorney General.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for and demanding the exercise by this Court of its supervisory powers in order that there may be a final determination of the authority of the Commissioner of Internal Revenue, after he has once fully exercised the discretion invested exclusively in him to compute the profits tax under Sections 327 and 328 of the Revenue Act of 1918, to thereafter review his previous computation and reach a different conclusion; that there may be a final determination of the authority of the Commissioner of Internal Revenue under the Revenue Act of 1921 after a tax has been assessed, paid and refunded to reassess and collect the amount thereof from the taxpayer as a tax; and that there may be a final determination of the construction and constitutionality of the provisions of Sections 607 and 611 of the Revenue Act of 1928 and that to such ends the writ of certiorari should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

THEODORE B. BENSON,
Attorney for Petitioner.

Of Counsel:
GUIL BARBER,
WILLIAM MEYERHOFF.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 104

OAK WORSTED MILLS, *Petitioner*,

v.

THE UNITED STATES

BRIEF FOR PETITIONER

THEODORE B. BENSON,
Attorney for Petitioner,
Washington, D. C.

Of Counsel,
GUIL BARBER,
WILLIAM MEYERHOFF,
PERCY A. MATTHEWS,
Washington, D. C.

BYRON S. ADAMS PRINTING CO., INC., WASHINGTON, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 104

OAK WORSTED MILLS, *Petitioner*,

v.

THE UNITED STATES

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

This is a suit brought by the petitioner, Oak Worsted Mills, in the Court of Claims to recover the amount of $8,003.08 (principal and interest), collected from it as an additional tax for the calendar year 1918, pursuant to a re-assessment made by the Commissioner of Internal Revenue, allegedly "to correct the excessive overassessment erroneously determined," after the expiration of the five-year period for collection prescribed by Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265. To the petitioner's cause of action the respondent relied on Section 611 of the Revenue Act of 1928, c. 852,

45 Stat. 791, 875, and the Court of Claims held (R. 32 et seq.) that the provisions of Section 611 are to be construed to defeat the right of the petitioner to sue and as so construed the provisions of the section are constitutional (36 F. (2d) 529, 38 F. (2d) 699).

This Court granted a writ of certiorari (50 S. Ct. 485, 281 U. S., 717) to review the decision of the court below and in granting the writ limited it to the question of the validity and effect of Section 611 of the Revenue Act of 1928.

I

OPINION OF THE COURT BELOW

The opinion of the court below was rendered by the Court of Claims on December 2, 1929, and a Supplemental opinion on February 17, 1930, in the case of this petitioner against the United States, No. J-180 on the records of that court. The opinions have been reported in 36 F. (2d) 529, 38 F. (2d) 699, and are a part of the record on this appeal (R. 28-52).

II

JURISDICTION

This Court has heretofore granted a writ of certiorari under the provisions of Section 3(b) of the Act of February 13, 1925 (45 Stat. 936).

The date of the judgment of the Court of Claims sought to be reversed is February 17, 1930 (R. 44). The petition applying for the writ of certiorari was filed on May 7, 1930, and was granted June 2, 1930.

III

STATEMENT OF THE FACTS

The petitioner, a corporation, on June 16, 1919, duly filed its return for the calendar year 1918 and reported therein a tax of $91,994.37, which was paid in full during the year 1919.

On June 27, 1921, the petitioner filed a claim for refund, the basis of which claim was an application for assessment of profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918. The Commissioner of Internal Revenue determined the tax under the provisions of Sections 327 and 328 and found an overassessment in the amount of $26,487.97, which was made the subject of a certificate of overassessment bearing date of June 21, 1922, and which said sum was refunded to the petitioner.

On or prior to March 26, 1924, the Commissioner without the petitioner's knowledge or consent made a reexamination of the petitioner's application and on that date notified the petitioner that the previous determination of the tax was erroneous and that the total tax liability under Sections 327 and 328 was $79,262.44 and that an additional tax was due in the amount of $13,756.02 and shortly thereafter assessed the said amount. On April 12, 1924, and on notice and demand for payment the petitioner filed a claim in abatement in the amount of $13,756.02, on the grounds that the matter had become res judicata and was barred by the statute of limitations and by the provisions of the revenue acts then in force.

On February 11, 1925, the Commissioner made a further redetermination of the tax and notified the petitioner, by departmental letter (R. 30), that the com-

paratives used in his previous redetermination were erroneous and that the petitioner had been overassessed $6,345.76 and that the claim in abatement would be allowed for that amount and rejected for $7,410.26.

On June 1, 1925, the collector made demand for the payment of the said sum of $7,410.26. Thereupon the petitioner, in the District Court of the United States for the Eastern District of Pennsylvania, sought to enjoin the collector and the injunction was denied July 1, 1925, 6 F.(2d) 662. On August 27, 1925, the collector again made demand for payment of the said sum of $7,410.26, which, together with interest in the amount of $592.83, was paid September 10, 1925.

The pertinent dates, with summary of facts, in the instant case are as follows (R. 29-32):

June 16, 1919—return filed.

June 21, 1922—overassessment determined and refund made to petitioner.

March 26, 1924—reassessment of part of refund made.

April 12, 1924—claim in abatement filed, claiming matter res judicata.

June 16, 1924—expiration of five-year period for collection of tax.

February 11, 1925—second redetermination of overassessment made.

March 26, 1925—petitioner filed petition with Board of Tax Appeals and later dismissed for lack of jurisdiction.

June 22, 1925—petitioner applied for injunction against collector and later denied (6 Fed. (2d) 662).

September 10, 1925—tax collected.

February 15, 1928—claim for refund rejected.

April 4, 1928—petition filed Court of Claims.

IV

SPECIFICATION OF ERRORS

1. The Court of Claims erred in holding that Section 611 of the Revenue Act of 1928 applied retroactively to cover the case of this petitioner.

2. The Court of Claims erred in holding that Section 611 of the Revenue Act of 1928 was more than an administrative provision and that it was a withdrawal of the consent of the United States to be sued.

3. The Court of Claims erred in not holding that the petitioner acquired a vested property right and a vested right of action upon the expiration of the period of limitation, and in not holding that Congress did not have the power to pass subsequent legislation to deprive the petitioner of these rights.

4. The Court of Claims erred in rendering judgment in favor of the respondent.

V

THE QUESTIONS PRESENTED

The questions presented are, is Section 611 of the Revenue Act of 1928 (45 Stat. 791, 875) to be construed to take from the petitioner its right and title to an amount illegally collected from it as a tax after the statutory period for collection and to deprive it of a vested right of action which it otherwise would have to its recovery; and, if so construed, does the section violate the Fifth Amendment of the Constitution.

VI

THE ARGUMENT

The questions involved and the errors specified are the same as those involved and specified in the case of *Taft Woolen Company* v. *United States*, October Term, 1930, No. 105. Counsel for petitioner ask leave of the Court to refer to and adopt the argument made in the brief of counsel for petitioner in that case. Counsel also beg leave to refer to petitioner's brief in the case of *Percival E. Magee* v. *United States*, October Term, 1930, No. 65, to briefs of Amici Curiae filed in the case of *R. E. Graham and E. E. Foster* v. *Rex B. Goodcell*, No. 36, October Term, 1930.

The Collection Of No Part Of The Tax Was Stayed By The Claim In Abatement: The tax in this case was assessed March 26, 1924, prior to the enactment of the Revenue Act of 1924. Prior to the decision of this Court in the case of *Russell* v. *United States*, 278 U. S. 181, 48 S. Ct. 121, the Commissioner of Internal Revenue interpreted the provisions of Section 278(d) of the Revenue Act of 1924 (43 Stat. 299) to mean that he had six years in which to collect a tax assessed prior to the enactment of the statute. The petitioner submits that the Commissioner of Internal Revenue failed to make collection of the tax, not because a claim in abatement was filed, but because he labored under the erroneous impression that he had six years from the date of the assessment in which to make collection. (R. 27-28).

Article 1272 of Regulations 65 promulgated by the Treasury Department for the administration of the Revenue Act of 1924 and which the Commissioner followed in

this case with reference to Section 278 of that Act, reads in part:

> "If the tax imposed by the Acts enumerated above has been assessed within the four-year period or the five-year period as required by section 277(a) of the statute (see article 1271) a proceeding in court or distraint for the collection of such tax may be begun within six years after the assessment thereof."

The Commissioner consistently followed this practice and is a matter of general knowledge and one of which this Court can take judicial notice.

CONCLUSION

In conclusion the petitioner contends that Sections 607 and 611 of the Revenue Act of 1928 are administrative provisions affecting only the Commissioner of Internal Revenue; that they in no sense can be construed as a withdrawal by the United States of its consent to be sued; that upon the expiration of the time specified in the statute the petitioner acquired vested property rights, subject to the protection of the Fifth Amendment of the Constitution of the United States, and that it is beyond the power of Congress to affect those rights by any subsequent legislation.

Respectfully submitted,

THEODORE B. BENSON,
Attorney for Petitioner,
Washington, D. C.

Of Counsel,
GUIL BARBER,
WILLIAM MEYERHOFF,
PERCY A. MATTHEWS,
Washington, D. C.

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No. 104

In the Supreme Court of the United States

OCTOBER TERM, 1929

OAK WOOLEN MILLS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 880

OAK WORSTED MILLS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

Two distinct questions are involved in the present case:

1. The first question is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (R. 4), should be construed to deprive the petitioner of the right which he otherwise would have had to recover taxes which had been collected after the statutory period of limitations had expired, and if so construed, whether it is in violation of the Fifth Amendment.

2. The second question arises on the following facts: The Commissioner of Internal Revenue computed petitioner's tax for the year 1918 under the special assessment provisions of the Revenue Act

of 1918, and as a result made a refund to the petitioner. Later he decided that his previous computation was erroneous and assessed an additional sum against the petitioner to correct this error. In order to avoid possible penalties, the petitioner paid the sum so assessed. The question is whether, having paid this sum, the petitioner can recover it on the ground that the Commissioner had no authority to alter his decision after making the refund, or on the ground that the Commissioner used an illegal method in recovering the amount of the refund.

I

The United States does not oppose the petition as to the first question stated above. That question is the same as that involved in *Graham and Foster, Co-partners, etc.* v. *Goodcell, Collector,* No. 589, October Term, 1929, writ of certiorari granted March 3, 1930, and in *Percival E. Magee* v. *United States,* No. 761, October Term, 1929, writ of certiorari granted May 19, 1930, both of which are now before this Court. There is also being submitted with this case a petition for a writ of certiorari in *Taft Woolen Company* v. *United States,* No. 881, October Term, 1929, which presents questions identical with those in the instant case.

The pertinent dates in the instant case are as follows (R. 29–32):

June 16, 1919—completed return for 1918 filed.

June 21, 1922—overassessment determined under special assessment provisions, and refund made to petitioner.
March 26, 1924—reassessment under relief provisions.
April 12, 1924—claim in abatement filed.
June 16, 1924—expiration of five year period for assessment and collection of tax.
February 11, 1925—claim in abatement rejected, and second redetermination made under special assessment provisions.
September 10, 1925—tax collected.
February 15, 1928—claim for refund rejected.

The Court of Claims in a decision (R. 32, 45) reported in 36 F. (2d) 529, and 38 F. (2d) 699, decided that Section 611 of the Revenue Act of 1928 barred recovery in this case.

II

The other question raised by the petition for certiorari, we submit, does not warrant the consideration of this Court.

The petitioner argues that the Commissioner, having determined the petitioner's tax under the provisions for special assessment, could not review and set aside his determination and, therefore, that his second assessment under Sections 327 and 328 of the Revenue Act of 1918 was illegal. Although such special assessments made by the Commissioner will not be reviewed by the courts (*Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551), it

is well settled that the Commissioner may review or set aside his determinations for fraud or mistake of law or fact. It is submitted that precisely the same question was involved in *Austin Co.* v. *Commissioner*, 35 F. (2d) 910 (C. C. A. 6th), although that case arose under a later Act. The question was there decided against the taxpayer's contentions, and this Court denied certiorari, 281 U. S. vi.

The Commissioner's authority to correct his own mistakes is implied from the discretionary power given him by statute to perform the difficult calculations required for special assessment. Similar cases have held that the Commissioner's rulings and determinations may be revised by him in the absence of a final statutory settlement between the Commissioner and taxpayer. *Harriton* v. *Lucas*, Ct. of App. D. C., decided May 5, 1930, not yet reported; *Loewy & Son, Inc.* v. *Commisisoner*, 31 F. (2d) 652 (C. C. A. 2d); *Holmquist* v. *Blair*, 35 F. (2d) 10 (C. C. A. 8th); *McIlhenny* v. *Commissioner*, C. C. A. 3d, decided March 4, 1930, not yet reported. The Board of Tax Appeals has consistently upheld the Commissioner's right to review his own determinations. *Appeal of Dallas Brass & Copper Co.*, 3 B. T. A. 856; *Appeal of Warner Sugar Refining Co.*, 4 B. T. A. 5; *Appeal of First National Bank of Plattsburg, Mo.*, 4 B. T. A. 478; and *Couzens* v. *Commissioner of Internal Revenue*, 11 B. T. A. 1040, 1154.

Most of the cases cited by the petitioner (R. 5, 6) as in conflict with the decision of the Court of

Claims, are like the *Williamsport Wire Rope case,* concerned only with a review *by the courts* of some administrative act. They decide merely that the administrative decision there involved was final only in the sense that it was not subject to review by the courts.

Of the cases cited by the petitioner, *Woodworth* v. *Kales,* 26 F. (2d) 178 (C. C. A. 6th), seems to be the one which most nearly supports its position. In that case the Commissioner was denied authority to revise his calculation of the 1913 value of property. But the court said (p. 181):

> we conclude that authority to review and revise such a valuation as this for fraud, mistake, or analogous ground is reasonably to be implied from the statutes, while power thus to repudiate the former action, merely because the commissioner has changed his view (or his predecessor's) of the evidence, is not reasonably implied.

In the present case the Commissioner stated that his previous determination was erroneous. (R. 30.) If *Woodworth* v. *Kales, supra,* is in conflict with the present decision, it has been in effect overruled by the court which decided it in *Austin Co.* v. *Commissioner,* 35 F. (2d) 910, *supra.*

The petitioner also argues that it should be allowed to recover the payment made, because, it is contended, the Commissioner used an illegal method in recovering the amount of the refund. But if the reassessment was validly made, the

amount of the refund was clearly due to the United States, and the payment, once having been made by the petitioner, can not be recovered. *Austin Co.* v. *Commissioner,* 35 F. (2d) 910, certiorari denied, March 17, 1930, *supra; Champ Spring Co.* v. *United States,* 38 F. (2d) 988 (E. D. Mo.). Whether the amount thus reassessed was technically a "deficiency" under the Revenue Act of 1921, or on the other hand a claim for money paid by mistake, can make no difference after the money has in fact been paid.

The petitioner cites *Talcott* v. *United States,* 23 F. (2d) 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604, and *Kelley* v. *United States,* 30 F. (2d) 193 (C. C. A. 9th), as in conflict with the decision below on this point. These cases hold respectively that in an action to recover estate taxes refunded by mistake a statutory limit on suits for collection of taxes is not applicable, and that such an action can not be brought on the equity side of the court. The opinion in the *Kelley case* states that the remedy of the Government to recover the amount of a refund erroneously paid is by an action at law. It considers only the procedural method by which an erroneous refund should be recovered by the Government. As the Government has here in fact recovered the money from the petitioner, cases relating to the method by which such a recovery can be made are beside the point.

CONCLUSION

We submit that the decision of the Court of Claims upon this second question was correct. There is no real conflict of authority on this question. We suggest that the Court limit its review to the question of the effect and validity of Section 611 of the Revenue Act of 1928.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
GEORGE H. FOSTER,
ERWIN N. GRISWOLD,
BRADLEY B. GILMAN,
Attorneys.

MAY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

Nos. 104 and 105

OAK WORSTED MILLS, *Petitioner*, *vs.* THE UNITED STATES	No. 104. On Writ of Certiorari to the Court of Claims.
TAFT WOOLEN COMPANY, *Petitioner*, *vs.* THE UNITED STATES	No. 105. On Writ of Certiorari to the Court of Claims.

PETITION OF OAK WORSTED MILLS AND TAFT WOOLEN COMPANY FOR A REHEARING

THEODORE B. BENSON,
WILLIAM MEYERHOFF,
Washington, D. C.
Counsel for Oak Worsted Mills and Taft Woolen Co.

BYRON S. ADAMS PRINTING CO., INC., WASHINGTON, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

Nos. 104 and 105

OAK WORSTED MILLS, *Petitioner*, *vs.* THE UNITED STATES	No. 104. On Writ of Certiorari to the Court of Claims.
TAFT WOOLEN COMPANY, *Petitioner* *vs.* THE UNITED STATES	No. 105. On Writ of Certiorari to the Court of Claims.

PETITION OF OAK WORSTED MILLS AND TAFT WOOLEN COMPANY FOR A REHEARING

Come now the above-named Oak Worsted Mills and Taft Woolen Company, and present this, their Petition for a Rehearing of the above-entitled causes and, in support thereof, respectfully show:

1. The opinion and judgment of the Court, rendered January 26, 1931, in R. E. Graham and E. E. Foster, Co-partners, doing business under the firm name of Millie Francis Oil Company, Petitioners, et al., Nos. 36, 104, 105, 323, 337, 463, 529, 565, 519, conflicts with the records and findings in the cases of these petitioners.

2. The opinion indicates that the Court, in applying the effect and validity of Section 611 to the cases of these petitioners, did not consider certain facts and find-

ings peculiar to them. This should distinguish them from the other cases. These distinguishing facts and findings are substantially as follows:

(a) The petitioners, after they had paid all their Income and Profits Taxes, made application and claim to the Commissioner of Internal Revenue for special assessment under the relief provisions of Sections 327 and 328 of the Revenue Act of 1918. Special assessment was granted, an overassessment determined and refund made.

(b) The claim in abatement, filed by petitioners, was a claim in bar of the re-assessment and re-collection of a sum assessed as an additional tax that had once been lawfully assessed, paid and satisfied in full, and the subsequent overassessment lawfully determined and refunded. There is no finding that the claim in abatement stayed the collection of a tax. (See concurring opinion, Judges Littleton and Graham, *Oak Worsted Mills* vs. *United States*, 38 F. (2) at page 704).

(c) There is no finding that the Commissioner of Internal Revenue had made an error or mistake of law or of fact in determining the overassessment and in making the refund.

(d) The total sum paid by petitioners as taxes was in excess of their proper tax liability, computed without regard to the statute of limitations.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the judgments of the Court of Claims be, upon further consideration, reversed.

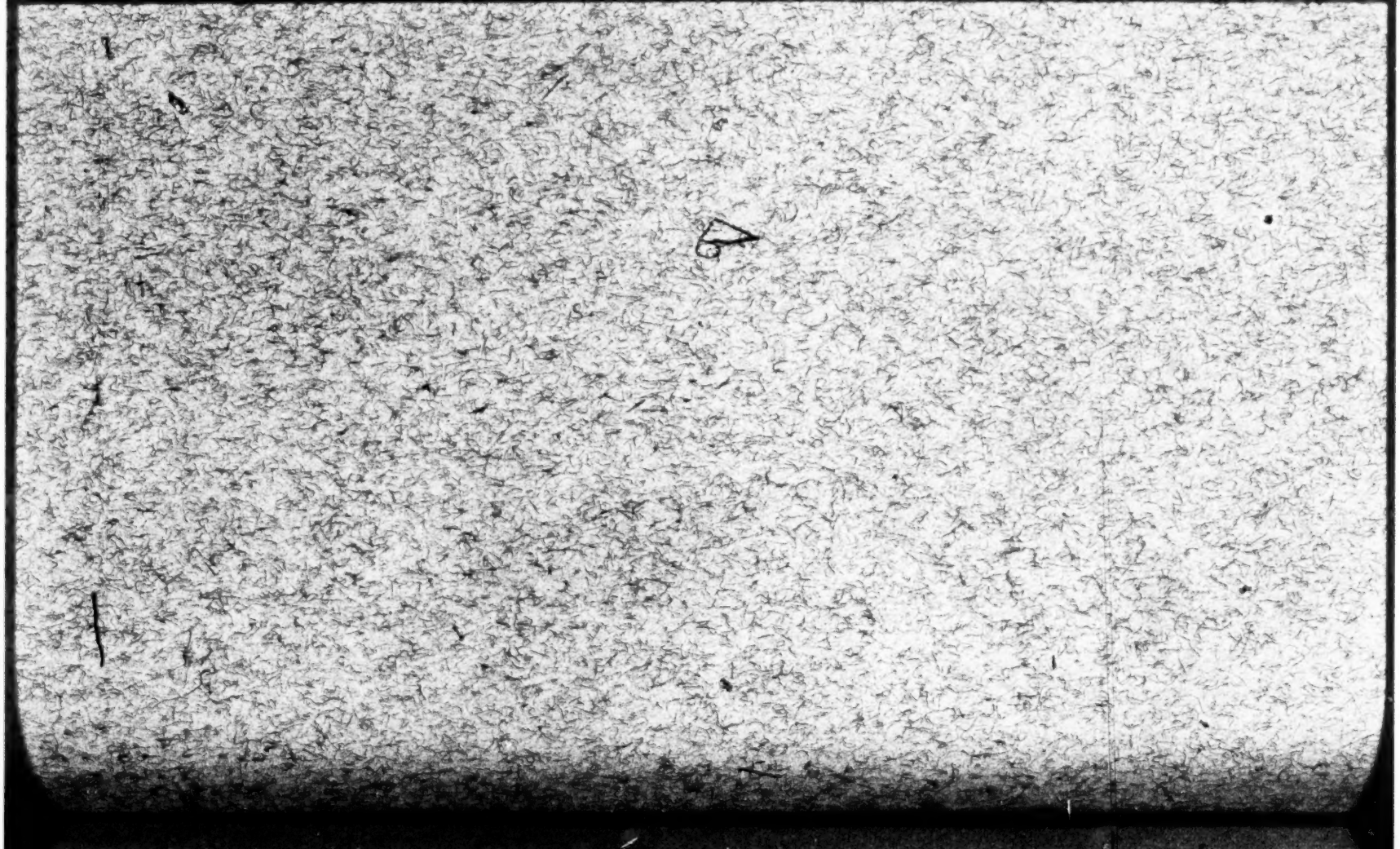
Respectfully submitted,

THEODORE B. BENSON,
WILLIAM MEYERHOFF,
Washington, D. C.
Counsel for Oak Worsted Mills and Taft Woolen Co.

CERTIFICATE OF COUNSEL

We, Theodore B. Benson and William Meyerhoff, counsel for the above-named Oak Worsted Mills and Taft Woolen Company, do hereby certify that the foregoing petition for a rehearing in these causes is presented in good faith and not for delay.

THEODORE B. BENSON,
WILLIAM MEYERHOFF,
Counsel for Oak Worsted Mills and Taft Woolen Co.



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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 105

TAFT WOOLEN COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 7, 1930

CERTIORARI GRANTED JUNE 2, 1930

(35,012)

(35,012)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 881

TAFT WOOLEN COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 9, 1930

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 881

TAFT WOOLEN COMPANY, a Body Corporate, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Theodore B. Benson, on behalf of Taft Woolen Company a body corporate, prays that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above entitled cause on March 3, 1930.

Statement

The petitioner, Taft Woolen Company, is a Massachusetts corporation and has its place of business in Caryville, town of Bellingham, Massachusetts. It filed its petition in the Court of Claims on February 21, 1928, and the respondent filed a general traverse.

On June 14, 1919, the petitioner duly filed its return of corporation income and profits taxes for the calendar year 1918 and during the year 1919 paid the tax reported therein in the sum of $429,705.75, and pursuant to an audit of the [fol. 2] return by the Commissioner of Internal Revenue and on July 29, 1921, paid an additional tax in the amount of $3,262.18, making a total of $432,967.93, and being the entire amount of tax imposed under Sections 230 and 301 of the Revenue Act of 1918.

The petitioner on December 8, 1921, duly filed a claim for refund of taxes erroneously assessed and collected, the basis of which claim being an application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

On or about October 7, 1922, the Commissioner of Internal Revenue, in consequence of said application and claim,

caused petitioner's tax liability to be recomputed under the relief provisions of said act and found, as a result thereof, that petitioner had been overassessed the sum of $92,443.00. The said overassessment was made the subject of a certificate of overassessment bearing date October 7, 1922, which was forwarded to and received by petitioner, together with a Treasury check in the sum of $92,443.00.

Nearly eighteen months thereafter and on March 25, 1924, the Commissioner notified the petitioner that a re-examination had been made of its application, together with all other evidence in the case, which re-examination disclosed that his prior determination was erroneous and that to correct the excessive overassessment erroneously determined an additional assessment was necessary, which said additional assessment the petitioner was advised would be listed immediately without giving the sixty-day notice provided by the Revenue Act of 1921.

[fol. 3] Prior to April 18, 1924, the petitioner filed a claim in abatement in the amount of $45,398.73 based on the grounds that the matter was res judicata, the collection of the tax was barred by the statute of limitations and that the total tax assessable for said year had already been paid in full.

On November 25, 1924, the Commissioner rejected the claim in abatement and advised the petitioner that the comparatives used in the re-determination "are in the aggregate fairly representative in all the material particulars specified in the Act".

More than five years from the filing of the return and on June 1, 1925, the petitioner paid under protest to the collector the said sum of $45,398.73 and interest demanded thereon in the amount of $1,800.81.

Statutes Involved

The statutes involved are Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057); Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875); and Section 3226 of the Revised Statutes, as amended (44 Stat. 116).

Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057) with reference to the computation of the excess profits tax and as applicable here read in part as follows:

"Sec. 327. That in the following cases the tax shall be determined as provided in section 328; * * *

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if [fol. 4] determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. * * *

"Sec. 328. (a) * * * In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactory determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary. * * *"

Section 250(d) of the Revenue Act of 1921 (42 Stat. 277, 265, 266) as applicable here reads in part as follows:

"* * * If upon examination of a return made under * * * the Revenue Act of 1918, or * * * a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then

determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *"

Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875) read as follows:

[fol. 5] "Sec. 607. Effect of Expiration of Period of Limitations Against United States

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928, (44 Stat. 116), reads as follows:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of

Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim [fol. 6] unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

A

Questions Presented

1. Whether the principle of law, that where an administrative officer or head of a department invested by an Act of Congress with exclusive jurisdiction to determine a matter involving purely administrative judgment and discretion has once reached a conclusion which is communicated agreeable to the requirements of the law his decision is final and conclusive and not subject to re-examination by the department, applies to the Commissioner of Internal Revenue?

2. Had the Commissioner of Internal Revenue authority, under Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266), to make the re-assessment, as an additional assessment to correct an alleged excessive overassessment where the entire tax imposed by statute had theretofore been assessed and paid in full?

3. Do the provisions of Section 611 of the Revenue Act of 1928 (C. 852, 45 Stat. 791, 876) apply to this case?

4. Had petitioner, on February 21, 1928, under Section 250(d) of the Revenue Act of 1921, acquired a vested right of action, a property right under the Constitution?

[fol. 7] 5. Does Section 611 of the Revenue Act of 1928, enacted May 29, 1928, deprive the Court of Claims of jurisdiction of petitioner's suit and petitioner of its remedy, under Section 3226 of the Revised Statutes, as amended?

B

Reasons for the Allowance of the Writ

1. The holding of the court below that the determination of a profits tax under Sections 327 and 328 of the Revenue Act of 1918 by the Commissioner of Internal Revenue is not final, conflicts with the decision of this Court in the case of Williamsport Wire Rope Co. v. U. S., 277 U. S. 551, 48 S. Ct. 587.

2. The holding of the court below that the Commissioner may review and reverse his previous exercise of discretion in the selection of comparatives for the computation of the tax under Section 328 conflicts with the decisions of this Court in the cases of Ex parte Randolph, 2 Brock (U. S.) 447; U. S. v. Bank of Metropolis, 15 Pet. 245, 40 U. S. 384; West v. Standard Oil Company, 278 U. S. 200, 49 S. Ct. 139 and U. S. v. Arredondo, 6 Pet. 729, 31 U. S. 691, and with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Woodworth v. Kales, 26 F. (2d) 178.

3. The holding of the court below that the principle, that an administrative officer's determination is final, does not apply to the Commissioner of Internal Revenue in this case, conflicts with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Park Falls Lumber Co. v. Burlingame, 1 F. (2d) 855, certiorari denied 266 U. S. 626, 45 S. Ct. 125.

[fol. 8] 4. The holding of the court below that the Commissioner of Internal Revenue has authority to re-assess as an internal revenue tax a tax previously assessed and collected, conflicts with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of Talcott v. U. S., 23 F. (2d) 897, certiorari denied 277 U. S. 604; and Kelly v. U. S., 30 F. (2d) 193.

5. The holding of the court below that the Commissioner had authority to make the re-assessment and re-collection of an overpayment of a tax legally refunded, amounts to usurpation by the executive department of the functions of the judicial department and the taking of petitioner's property, without due process of law, in violation of Article III, Section I and Amendment V, respectively, of the Constitution.

6. The holding of the court below that the Commissioner may make such re-assessment, in the absence of authority conferred by Congress, conflicts with the decision of this Court in the case of Meriwether v. Garrett, 102 U. S. 501, 26 L. Ed. 197.

7. The foregoing questions are of public importance for the reason that other cases involving the same questions are now pending in the courts and still others are under consideration by the Treasury Department. This is recognized by the Court of Claims in the case of Oak Worsted Mills v. U. S. decided February 19, 1930, 36 F. (2d) 529, in which the court stated that there are other cases on the docket involving the same questions.

[fol. 9] 8. The questions involved in this case with reference to Section 611 of the Revenue Act of 1928 are substantially the same as those involved in the case of Graham and Foster Co-partners etc., petitioners, v. Goodcell, Collector, No. 589, October 1929 Term, in which case this Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on March 3, 1930. The decision of the circuit court of appeals is reported in 35 F. (2d) 586.

Wherefore it is respectfully submitted that this petition should be granted.

Taft Woolen Company, by Theodore B. Benson,
Theodore B. Benson, Counsel for Petitioner.

[fol. 1] IN THE COURT OF CLAIMS

No. J-61

TAFT WOOLEN COMPANY, a Body Corporate, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed February 21, 1928

To the Honorable Chief Justice and Justices of the Court of Claims:

Your plaintiff, Taft Woolen Company, respectfully represents to this Honorable Court as follows:

1. That plaintiff now is, and at all the times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, having its principal office and place of business in the Village of Caryville, Town of Bellingham, in the County of Norfolk, in said State, and now is, and at all the times hereinafter mentioned was, engaged in the manufacture and sale of woolen goods; and presents this, its petition and claim, in its own right as such corporation and against the United States.

2. That on or about March 14, 1919, as required by the Commissioner of Internal Revenue and on Form 1031-T, [fol. 2] furnished it by said Commissioner for such purpose, plaintiff filed, with the Collector of Internal Revenue at Boston, Massachusetts, its original Income and Profits Tax Return for the calendar year 1918, showing an estimated tax liability of $291,590.59, and at the same time paid to said Collector the sum of $72,897.65.

3. That thereafter and on or about June 14, 1919, plaintiff duly filed with the said Collector its amended and complete return for the year 1918, which said return upon its face showed the amount of tax computed in accordance with the provisions of Section 301 of the said Revenue Act of 1918 to be the sum of $429,616.20 and with said return paid by check to the order of said Collector the sum of $141,910.45 which said sum, together with the sum of $72,897.65

paid by plaintiff upon the filing of its original return on Form 1031-T, constituted fifty per cent of the total tax shown to be due by said return and thereafter, and on or before January 1st, 1919, paid to said Collector the remainder of said tax, to-wit, the sum of $214,808.10.

4. Thereafter, as the result of recommendations made by a Field Agent of the Department of Internal Revenue upon an examination of plaintiff's books of account, an additional assessment in the sum of $3,262.18 was made by the Commissioner against plaintiff for income and profits tax for said year 1918, and thereafter and on or about July 29, 1921, plaintiff paid to the said Collector the sum of $3,262.18, the amount of said additional assessment, making a total of income and profits taxes for the calendar year 1918 paid by [fol. 3] plaintiff to said Collector as aforesaid amounting to $432,878.38.

5. Thereafter and on or about December 8, 1921, plaintiff duly applied to the Commissioner of Internal Revenue for assessment of its profits tax for said year under the provisions of Sections 327 and 328 of said Revenue Act of 1918.

6. Thereafter and upon said application the said Commissioner granted the said application and found and determined and declared of record that the tax if determined without the benefit of said Section 327 would, owing to abnormal conditions affecting the capital and/or income of plaintiff, work upon plaintiff an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of said Section and the tax computed by reference to the representative corporations specified in Section 328 of said Act.

7. Plaintiff's net income for the said year under the provisions of the said Revenue Act of 1918 has been finally determined by the said Commissioner to be $564,049.89, in the correctness of which amount plaintiff acquiesces.

8. On or about October 7, 1922, pursuant to the provisions of Sections 250, 327 and 328 of the said Revenue Act of 1918, the Commissioner examined plaintiff's return for said year and recomputed the amount of tax payable by plaintiff for the said year and determined the amount of profits tax

payable by plaintiff for said year at the sum of $310,485.00, and determined the amount of income tax payable by plain-
[fol. 4] tiff for the said year at the sum of $29,950.38, and determined the total amount of income and profits tax payable by plaintiff for the said year at the sum of $340,435.38.

9. The said amount of profits tax so determined by the Commissioner was computed in accordance with the provisions of Sections 327 and 328 of the Revenue Act of 1918, and was determined by the Commissioner as being the amount bearing the same ratio to plaintiff's net income (in excess of the specific exemption of $3,000.00) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bore to their average net income (in excess of the specific exemption of $3,000.00) for such year, and was arrived at by the Commissioner by comparing plaintiff only with representative corporations whose invested capital could be satisfactorily determined under Section 326 of said Act, and which were as nearly as may be similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits and excess profits, and all other relevant facts and circumstances.

10. The said determination of the Commissioner was duly communicated to plaintiff by letter or certificate of overassessment of the Commissioner on or about October 7, 1922.

11. In and by said determination of the Commissioner, and the said recomputation of the tax by him, the Commissioner found and determined that the correct amount of
[fol. 5] income and profits tax legally payable by plaintiff for said year was the said sum of $340,435.38, to which sum the Commissioner found that there was to be added interest amounting to the sum of $517.60, and the Commissioner further found and determined that the total tax and interest assessable against plaintiff amounted to $340,952.98. In and by said determination and recomputation, the Commissioner further found that the amount theretofore paid by plaintiff, as aforesaid, amounting to the said sum of $435,395.98, exceeded the said sum of $340,952.98, which

should have been paid, so recomputed, by the sum of $92,-443.00, of all of which the Commissioner in and by said notification of October 7, 1922, notified plaintiff and further notified plaintiff that, pursuant to the said determination and recomputation, plaintiff was entitled to the refund of the said overassessment of $92,443.00.

12. Thereafter and pursuant to the said determination and recomputation and notification, the said sum of $92,-443.00 was duly repaid and refunded to plaintiff by the Commissioner.

13. Long after the said case involving the liability of plaintiff to income and profits taxes for the said year had been closed by the said Commissioner, and the said determination and recomputation made as aforesaid, and the said over-assessment repaid and refunded to plaintiff as aforesaid, and on or about March 25, 1924, the Commissioner undertook and assumed to reopen the said case and to redetermine and recompute the amount of income and profits tax of plaintiff for said period, and assumed and [fol. 6] purported to find and determine that the amount of profits tax payable by plaintiff for said period was the sum of $362,662.65, and the amount of income tax payable by plaintiff for said period was the sum of $23,689.06, and that the total amount of income and profits tax payable by plaintiff for said period was the sum of $386,351.71, which exceeded the sum of $340,952.98, theretofore determined and recomputed by the Commissioner as aforesaid, by the sum of $45,398.73. Thereafter the Commissioner assumed and purported to assess against plaintiff the said alleged deficiency of $45,398.73, assumed and purported to be determined by the Commissioner, to be payable by plaintiff as aforesaid.

14. The Commissioner, having theretofore after due consideration determined and recomputed and assessed the amount of income and profits tax payable by plaintiff for said year, and having allowed and paid to plaintiff the amount of over-assessing resulting from such determination and assessment, and the case having been closed as aforesaid, was without power or jurisdiction to make another and further redetermination, recomputation and

assessment of the same taxes for the said period, and the said assessment of $45,398,73, was without jurisdiction and null and void.

15. In making the said redetermination, recomputation and assessment, the Commissioner erroneously disregarded the determination and assessment of said tax theretofore made by him as aforesaid, and which had become res judicata, and the said redetermination, recomputatin and assessment of $45,398.73 was erroneous and illegal for that [fol. 7] reason, even assuming that the Commissioner had any jurisdiction whatever to make a further determination or computation of taxes for said year.

16. The Commissioner, in assuming to reopen the case and to make a new and further redetermination, recomputation and assessment of an alleged deficiency as aforesaid has not disclosed to plaintiff the facts, evidence or basis upon which the Commissioner acted in assuming to make the same, nor given plaintiff an opportunity of being heard thereon, and has not disclosed to plaintiff any new facts or additional evidence as a basis of or ground for such reopening or new redetermination, and plaintiff avers that there are no new facts and no additional evidence which might have constituted any basis of or ground for any such reopening or redetermination or assessment.

17. The failure and refusal of the Commissioner to disclose the said facts and information to plaintiff, and to give plaintiff an opportunity of being heard thereon, operated to deprive plaintiff of its legal rights under the law and the regulations, and constitutes a deprivation of plaintiff's property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

18. At the time of the making of the said redetermination and recomputation, and at the time of making of the said assessment, and at the time of the enactment of the Revenue Act of 1924, more than five (5) years after the said return filed as aforesaid on or about March 14, 1919, was made [fol. 8] had expired. At the time of the collection and payment of the said assessment under protest as hereinafter set forth, more than five years after the said returns

and each of them were made had expired. The Commissioner and the taxpayer, the plaintiff herein, have not consented in writing to the determination or assessment or collection of said tax for said year of 1918, after the time prescribed by law for the assessment thereof, and the return was not false or fraudulent with intent to evade the tax. By virtue of the provisions of Section 250 (d) of the Revenue Act of 1918, and of Section 250 (d) of the Revenue Act of 1921 (42 Stat. 227), the Commissioner was, by reason of said lapse of time, without power to make said determination of said assessment, or to enforce collection thereof.

19. The said redetermination and recomputation of the amount of said taxes by the Commissioner purported to be, but was not in fact based upon the tax paid for the said period by representative corporations engaged in a like or similar trade or business, which were as nearly as might be similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits and excess profits tax and all other relevant facts and circumstances.

20. The amount of profits tax bearing the same ratio to plaintiff's net income (in excess of the specified exemption of $3,000) for the said taxable year, as the average tax of representative corporations engaged in a like or similar trade or business whose invested capital could be satis- [fol. 9] factorily determined under section 326 of said act, and which were as nearly as may be similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits and excess profits, and all other relevant facts and circumstances, bore to their average net income (in excess of the specified exemption of $3,000) for such year, was not greater than the sum of $310,485.00 as first determined by Commissioner as aforssaid, in accordance with the provisions of said sections 327 and 328 of said Revenue Act of 1918, and the total income and profits tax lawfully and properly payable by said plaintiff for said year was not in excess of the said amount of $340,952.98 determined by the Commissioner as aforesaid, and that the

said first determination of the Commissioner was correct and lawful.

21. After the making of the said redetermination and recomputation and of the said assessment of $45,398.73, plaintiff duly protested to the Commissioner against the same and on or about April 11, 1924, filed with the said Collector, in accordance with the law and the regulations established by the Secretary of the Treasury in that behalf, a claim for the abatement of said assessment of $45,398.73, in and by which said claim for abatement plaintiff protested that said redetermination and assessment were without jurisdiction or power, and were null and void, illegal, erroneous, and excessive upon all the grounds herein set forth. That thereafter and on or about November 25, 1924, the Commissioner rejected the said claim for abate- [fol. 10] ment and notified plaintiff that plaintiff would be required to make payment of the amount of said assessment to the said Collector upon receipt of notice and demand from him.

22. Thereafter and on or about May 20, 1925, the said Collector served upon plaintiff a notice and demand for the payment of the said sum of $45,398.73, the amount of said assessment, together with interest, amounting in all to the sum of $47,199.54, and then and there notified plaintiff that in the event of plaintiff's failure to make payment thereof within ten days after the date of said notice, plaintiff would be liable to additional penalties and penal interest. Thereafter and on or about May 30, 1925, under duress of the said assessment and of the said demand, and to avoid threatened penalties and the accumulation of excessive interest charges, and the threatened seizure of plaintiff's property under warrant of distraint, plaintiff paid to said Collector, under protest, the said sum of $47,199.54, the amount of said assessment and interest demanded as aforesaid.

23. Thereafter and on or about April 7, 1926, plaintiff duly filed with the said Collector, in the form and manner required by law and the regulations of the Secretary of the Treasury of the United States established in pursuance thereof, a claim for refund of the said assessment and in-

terest of $47,199.54, illegally collected as aforesaid, which claim for refund was thereafter and on or about May 12, 1926, rejected and disallowed by said Commissioner, and the said application for refund denied, and no part of said [fol. 11] sum of $47,199.54 has been repaid to plaintiff but the whole of said sum of $47,199.54, tax paid by plaintiff as aforesaid, is now wrongfully and unlawfully retained and held by the United States.

24. Thereafter and on or about May 26, 1927, plaintiff duly filed with the said Collector, in the form and manner required by law and the regulations of the Secretary of the Treasury of the United States established in pursuance thereof, another claim for refund of the said assessment and interest of $47,199.54 illegally collected as aforesaid; that more than six months have expired since the filing of said claim for refund, but that the Commissioner of Internal Revenue has rendered no decision thereon.

25. Plaintiff avers that by reason of the premises plaintiff is entitled to refund of the said sum of $47,199.54 together with interest thereon from May 31, 1925.

26. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. It is and always has been the sole and absolute owner of the claim here presented and has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It believes the facts as stated herein to be true, and that it is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set offs.

[fol. 12] Plaintiff therefore prays judgment in its favor against the United States of America for the said sum of $47,199.54, with interest thereon from May 31, 1925.

Taft Woolen Company, Plaintiff, by Frederick G. Fischer, Attorney for Plaintiff.

Address of plaintiff's attorney: Frederick G. Fischer, 111Broadway, Borough of Manhattan, City of New York, New York.

Duly sworn to by Harold M. Bullard. Jurat omitted in printing.

[fol. 13] II. General Traverse—Filed March 31, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

G. H. F.

III. Substitution of Attorney

The original petition in this case was filed by Frederick G. Fischer, Esq.

On May 24, 1929, on motion made therefor, Chester F. Williams, Esq., was substituted as attorney of record.

IV. Argument and Submission

On January 14 and 15, 1930, this case was argued and submitted on merits by Mr. Guil Barber, for the plaintiff, and by Mr. George H. Foster, for the defendant.

[fol. 14] V. **Special Findings of Fact and Conclusion of Law**—Filed March 3, 1930

This case having been heard by the Court of Claims, the court, upon the report of a commissioner, makes the following

Special Findings of Fact

I

The plaintiff, Taft Woolen Company, is a corporation duly organized and existing under the laws of the State

of Massachusetts, having its principal office and place of business in the village of Caryville, town of Bellingham, in said State, and during the calendar year ended December 31, 1918, was, and now is, engaged in the manufacture and sale of low-grade woolens.

II

On or about March 14, 1919, the plaintiff filed with the collector of internal revenue at Boston, Massachusetts, for the calendar year 1918, its Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return, on Form 1031-T, furnished to plaintiff by the Commissioner of Internal Revenue, and on said date paid to the said collector the sum of $72,-897.65 as one-fourth of the estimated tax of $291,590.59 as shown on said tentative return. The following rider was attached to the said return:

"The company claims the benefit of sections 327 and 328 of the excess and war profits law, and article 901 of the Regulations. The tax as figured without the benefit of these sections is in excess of 50% of its net income, and for that reason the tax is estimated at 50% of such income, and the income tax has been computed upon the basis of a deduction of such tax. The company reserves all rights of protest against the application of regulations and Treasury decisions affecting the computation of its tax."

[fol. 15] III

On or about June 14, 1919, the plaintiff completed said return as filed on or about March 14, 1919, as aforesaid, by filing its corporation income and profits tax return for the calendar year 1918 on Form 1120 for said calendar year with the collector of internal revenue, which return showed a total tax liability computed under the provisions of sections 201 and 301 of the revenue act of 1918 of $429,616.20. At the time of filing Form 1120 as aforesaid the plaintiff paid to the said collector the sum of $142,000, being one-quarter of the total tax so found to be due, to wit, $107,-404.05, plus a deficiency in the March 14, 1919, payment of $34,506.40, and on account of interest on said deficiency, $89.55. Subsequently, as required by law, the plaintiff paid

to the said collector on September 13, 1919, the sum of $107,404.05, and on December 13, 1919, the sum of $107,404.05, making in all the total sum of $429,705.75 so paid.

IV

On or about February 14, 1921, the Commissioner of Internal Revenue informed the plaintiff that an audit of its return for the year ended December 31, 1918, indicated that it was subject to an additional tax in the amount of $3,262.18 for the year. On July 29, 1921, the plaintiff paid said sum to the said collector, thus making a total of income and profits taxes for the calendar year 1918 paid by the plaintiff to the said collector as aforesaid amounting to $432,967.93.

V

The said commissioner having failed to act on plaintiff's claim and application for the benefit of sections 327 and 328 of the revenue act of 1918, plaintiff, on or about December 8, 1921, duly filed with the collector of internal revenue aforesaid a further application for assessment of its profits tax under the provisions of said sections, which said application was attached to a claim for a refund of taxes erroneously or illegally assessed and collected in the sum of $152,008.52.

VI

On or about October 7, 1922, the Commissioner of Internal Revenue, in consequence of said application and claim, caused plaintiff's tax liability to be recomputed under the relief provisions of said act and found, as a result thereof, that plaintiff had been overassessed the sum of $92,443.00. The said overassessment was made the subject of a certificate of overassessment bearing date October 7, 1922, which was forwarded to and received by plaintiff, together with a Treasury check in the sum of $92,443.00, and in due course plaintiff received the proceeds thereof.

VII

On or about March 25, 1924, the Commissioner of Internal Revenue informed the plaintiff that a reexamination had

been made of its application for assessment of its profits tax under the relief provisions of the revenue act of 1918, together with all other evidence in the case, which reexami- [fol. 16] nation had disclosed the fact that the computation previously made which had resulted in the issuance of a certificate of overassessment in the amount of $92,443.00 was an erroneous one, and that a correct computation of the plaintiff's tax liability under sections 327 and 328 of the revenue act of 1918 indicated an additional tax due of $45,-398.73. The plaintiff was further informed that the additional assessment necessary to correct the excessive overassessment erroneously determined would be listed immediately without the usual thirty-day notice as provided in section 250 (d) of the revenue act of 1921. The said amount of $45,398.73 was reassessed by the said commissioner shortly thereafter.

VIII

On April 18, 1924, the collector of internal revenue at Boston, Massachusetts, transmitted to the plaintiff a demand for tax, notifying the plaintiff that there had been assessed against it the sum of $45,398.73, and that if payment was not made within ten days from the date of the notice, a penalty of 5% of the amount of tax would be added plus interest at the rate of 1% per month until paid.

Prior to April 18, 1924, the plaintiff filed in the office of the Commissioner of Internal Revenue at Washington a claim for abatement of the additional tax of $45,398.73 assessed, on the grounds that the matter had become res adudicata and was also barred by the statute of limitations; that the total tax assessable for said year had already been paid in full; that the said claim for refund had been duly allowed only after careful consideration of all the facts and that check in payment thereof had been accepted in full settlement; that the said commissioner was without legal authority to make the re-examination and assessment.

On or about November 25, 1924, the Commissioner of Internal Revenue rejected the plaintiff's claim for abatement stating that—

"* * * the bureau holds that the Commissioner of Internal Revenue may assess any tax found to be due even

though such tax may have previously been erroneously abated or refunded, provided that such assessment is made within the time prescribed by statute and that the comparatives used in the final determination are in the aggregate fairly representative in all the material particulars specified in the act."

IX

On or about December 20, 1924, the plaintiff filed an appeal from the said additional tax of $45,398.73 with the United States Board of Tax Appeals, which said appeal was dismissed by said board April 11, 1925, on the ground it was without jurisdiction.

X

On or about May 20, 1925, the said collector demanded payment in writing of the said sum of $45,398.73, together with interest in the total sum of $47,199.54, and notified plaintiff that if said sum was not paid within ten days after date of said notice plaintiff would be liable for additional penalties and penal interest.

[fol. 17] Thereafter on or about June 1, 1925, the plaintiff paid to the collector of internal revenue at Boston the sum of $47,199.54, which payment included both the special assessment of $45,398.73 and interest in the amount of $1,800.81. In its letter of May 30, 1925, transmitting to the collector of internal revenue the check for $47,199.54, hereinbefore referred to, plaintiff stated that the payment was made under protest. It asserted that the alleged assessment was made illegally, erroneously, and wrongfully; that the payment was made under protest because demanded and to avoid threatened penalties and the accumulation of excessive interest charges and the seizing of the taxpayer's property under warrant of distraint. Plaintiff reserved the right to recover all or any portion of the payment by any lawful process.

XI

On or about April 7, 1926, plaintiff filed with the collector of internal revenue its claim for refund of taxes ille-

gally collected in the sum of $47,199.54. Plaintiff alleged that its application should be allowed for the following reasons:

"The additional assessment was beyond the power of the commissioner to make, the amount of income and profits taxes payable by claimant for said period having been theretofore determined and assessed by the commissioner, and the case having been closed; the commissioner made the said additional assessment in disregard of the determination and assessment theretofore made by him, and reopened the case without additional evidence or sufficient ground; the amount of tax assessed was erroneously computed and excessive, and was determined without regarding claimant's right to a disclosure of the facts and evidence upon which same was based, and in violation of the fifth amendment to the Constitution of the United States; the assessment and collection of the said taxes were barred by limitation; and the additional assessment was illegal, excessive, and erroneous on other grounds, which claimant reserves the right to present in detail hereafter."

On or about May 18, 1926, the plaintiff's claim for refund was rejected by the Commissioner of Internal Revenue, the commissioner stating in his letter of rejection that the evidence in hand did not warrant any change in the computation of the tax liability disclosed by the commissioner's letter of March 25, 1924, hereinbefore referred to in Finding VIII hereof.

XII

On or about May 9, 1927, the plaintiff filed another claim for refund of said sum of $47,199.54, on the following grounds:

"1. That the alleged tax is erroneous, excessive, and illegal.

"2. That the collection of said alleged tax was barred, at time of payment, by the tolling of the statute of limitations, for the following reasons, to wit:

"a. That payment was exacted more than five years after the return was filed;

"b. That no suit or proceeding was instituted within the five-year period;

[fol. 18] "c. That the return was not false or fraudulent, neither had 'both the commissioner and the taxpayer consented in writing to a later determination, assessment, and collection of the tax.' (See sec. 250 (d), rev. act 1921.)

"3. That, by reason of the expiration of the statute of limitations applicable, not only was the procedure for its collection barred, but the right, if any, of the Government to the alleged tax itself is extinguished.

* * * * * * *

"Reference is here made to a claim in abatement, also a claim for refund, together with supporting evidence and brief, heretofore filed with the Commissioner of Internal Revenue in reference to the said alleged tax, all of which is hereby reaffirmed and made a part hereof with the same force and effect as if hereto attached."

XIII

The defendant, the United States, still has and retains the sum of $47,199.54, herein sought to be recovered.

XIV

Plaintiff's return was neither false nor fraudulent, with intent to evade the tax, nor had plaintiff signed any waiver in connection with said calendar year nor any consent in writing with the commissioner for a later determination, assessment, and collection of the tax.

XV

More than six months had expired since the filing of said claim for refund of May 9, 1927, and the Commissioner of Internal Revenue had rendered no decision thereon at the time of the filing of plaintiff's petition herein—on, to wit, February 21, 1928.

XVI

No other action has been taken, or had, either in Congress or by any of the departments of the Federal Gov-

ernment. The plaintiff is now and has always been the sole owner of the claim or claims herein referred to and has not assigned or transferred the same, or any part thereof, or interest therein, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the Government.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and the petition is therefore dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law.

See Oak Worsted Mills, No. J.-180, decided February 17, 1930.

[fol. 19] VI. Judgment

At a Court of Claims held in the City of Washington on the 3rd day of March, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

[fol. 20] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,012. Court of Claims. Term No. 881. Taft Woolen Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed May 7, 1930. File No. 35,012.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted, the briefs and argument to be limited to the question of the validity and effect of Sec. 611, Revenue Act of 1928, and the case is advanced to be heard immediately following No. 880, Oak Worsted Mills vs. The United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929

No. 881.

TAFT WOOLEN COMPANY, PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion of the Court Below.

The special findings of fact and conclusion of law are officially reported in 38 F. (2d) 704, and will be found printed at R.16–23.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 (a) of the Act of February 13, 1925 (43 Stat. 936).

The judgment of the Court of Claims was entered on March 3, 1930 (R. 23). Application for writ was presented May 7, 1930.

The suit brought in the Court of Claims is for the recovery of corporation income and profits taxes erroneously and illegally assessed and collected, jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

The Facts.

The facts of the case are printed in the petition (R. 1–2) and to avoid repetition counsel begs leave to refer to those pages which contain the shortest and plainest statement that he has been able to make.

IV.

The Statutes Involved.

The statutes involved in this case are printed in the petition (R. 2–5) and to avoid repetition counsel begs leave to refer thereto.

V.

Specification of Errors to be Urged.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the review and reversal of the decision of the Court of Claims are:

1. The court below erred in holding that the Commissioner of Internal Revenue once having exercised a discretion and judgment invested exclusively in him by an Act of Congress and having determined and refunded an overassessment of tax, had authority to thereafter review the same facts and reach a different conclusion.

2. The court below erred in holding that the determination of the tax by the Commissioner of Internal Revenue under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was merely prima facie and not conclusive.

3. The court below erred in failing to hold that once having computed the profits tax on the basis of comparatives selected in the exercise of the discretion conferred on him by the provisions of Section 328 of the Revenue Act of 1918 and having issued a certificate of overassessment and made the refund of the overpayment, the judgment of the Commissioner of

Internal Revenue was final and conclusive and was thereafter not subject to review.

4. The court below erred in failing to hold that under the provisions of the Revenue Act of 1921 the Commissioner of Internal Revenue was precluded from making the reassessment, as an additional assessment to correct an alleged excessive overassessment previously determined, where the entire amount of the tax imposed by statute had once been assessed and paid.

5. The court below erred in failing to hold that the Commissioner of Internal Revenue in assuming to decide that his previous determination of the profits tax under Section 328 was erroneous and in recollecting an amount theretofore paid usurped the functions of the judiciary in violation of Article III, Section I, of the Constitution and took the petitioner's property without just compensation in violation of the Fifth Amendment.

6. The court below erred in holding that Section 611 of the Revenue Act of 1928 is applicable to this case.

7. The court below erred in holding that Section 611 deprived the Court of Claims of jurisdiction in this case.

8. The court below erred in failing to hold that the petitioner's remedy under Section 3226 of the Revised Statutes was not affected by Section 611 of the Revenue Act of 1928.

9. The court below erred in failing to hold that the application of Section 611 to this case would render that section unconstitutional.

10. The court below erred in failing to hold that on the expiration of the five-year period of limitation in Section 250 (d) of the Revenue Act of 1921 the petitioner's liability for taxes, if any, expired.

VI.

The Argument.

Summary of Argument.

A. The determination by the Commissioner of Internal Revenue of the profits tax under Sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined.

B. The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined.

C. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The jurisdiction of the court below is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor within the exceptions thereto in Section 611 of the same Act.

2. The provisions of Section 611 are not to be construed to be retroactive to apply to this case.

3. In this case no internal revenue tax was legally assessed within the meaning of the provisions of Section 611.

4. The amount in controversy is not an internal revenue tax within the meaning of Section 611, because the entire tax imposed by statute had already been assessed and paid.

5. In this case no claim in abatement within the meaning of Section 611 was filed. The claim was not in abatement but in bar of the right of the Commissioner to make the re-collection.

6. The collection of no part of a tax was ever stayed by a claim in abatement or otherwise.

7. The amount in controversy was paid under protest.

8. The petitioner and the Commissioner did not enter into a statutory consent in writing for a later determination, assessment or collection of any tax beyond the statutory period as provided in Section 250 (d) of the Revenue Act of 1921.

D. The application of Section 611 of the Revenue Act of 1928 to this case would render it unconstitutional for the following reasons:

1. The power conferred on Congress by the Sixteenth amendment is limited to the laying and collecting of taxes on incomes.

2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

The Argument.

A. *The determination of the profits tax by the Commissioner of Internal Revenue under the provisions of sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined.*

A principle of law that this Court has uniformly upheld is that, where an administrative officer vested by an Act of Congress with exclusive jurisdiction of a matter involving administrative discretion and judgment has once reached a conclusion which has been communicated agreeable to the requirements of law, his decision is final and is not subject to reexamination.

This principle has been recognized in the following cases: *Ex parte Randolph*, 2 Brock (U. S.) 447; *United States* v. *Bank of Metropolis*, 15 Pet. 377, 40 U. S. 240; *West* v. *Standard Oil Company*, 278 U. S. 200, 49 S. Ct. 138. This principle was stated by Mr. Justice Baldwin in *United States* v. *Arredondo*, 6 Pet. 691, 729–730, as follows:

"* * * It is a universal principle, that, where power or jurisdiction is delegated to any public officer or

> tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise * * * are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive * * * legislative * * * judicial * * * or special * * * unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law. * * *"

The question here involved is whether this principle applies to the Commissioner of Internal Revenue in the exercise of that discretion, which this Court in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 48 S. Ct. 587, held was conferred upon him exclusively by Sections 327 and 328 of the Revenue Act of 1918 to select comparatives for the computation of the profits tax and from the exercise of which discretion it was held no appeal was provided.

In this case the Commissioner determined that the petitioner came within the provisions of Section 327 and that it was entitled to have the profits tax computed under the provisions of Section 328.

After having determined that the petitioner was so entitled, the Commissioner in October, 1922, computed the profits tax on the basis of certain comparatives selected by him and actually made a refund on the basis of such comparatives. Subsequently and during March, 1924, and without reversing his previous position as to the fact that petitioner's case fell within the scope of Section 327 of the Revenue Act of 1918 and that the tax should be computed under the provisions of Section 328 of the said Act, the Commissioner undertook to reinvoke the discretion which he had already exercised and proceeded to recompute the profits tax by choosing from his files and substituting different comparatives showing a greater average rate of excess profits tax to net income which resulted in the increase of petitioner's taxes. In explanation of this

the Commissioner stated "that the comparatives used in the final determination are in the aggregate fairly representative." In this case there is no fact controversy.

The question that the petitioner seeks to have this Court pass on is the right of the Commissioner of Internal Revenue to reexercise the discretion vested exclusively in him to select comparatives for the computation of the profits tax. Under the decision in the *Williamsport Wire Rope Co., supra,* this discretion is held to be vested solely in the Commissioner and his determination thereunder is not subject to question in a case like this where no appeal can be taken to the Board of Tax Appeals.

The petitioner submits that the decision of the court below, that the exercise of discretion by the Commissioner is not final, is erroneous and should be reversed. The question involved is of public importance for the reason that there are a number of other cases pending which involve the same question and for the further reason that if the decision of the court below is not reversed it will mean the Commissioner can reopen any case in which the statute of limitations has not run. The question here involved is one of importance and calling for the exercise of this Court of its supervisory powers over the Court of Claims.

B. *The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined.*

The powers possessed by the Commissioner of Internal Revenue are such only as are conferred on him by Congress. At the time he assumed to make the reassessment here in question the Revenue Act of 1921 was in force and is controlling, *Russell* v. *United States,* 278 U. S. 181, 49 S. Ct. 121. The authority of the Commissioner to assess and collect taxes under such Act is that conferred by Section 250, subparagraph (b) of which defines a deficiency and authorizes the Commissioner to assess a deficiency or to refund an overpayment and subparagraph (d) provides the manner in which the Commissioner may make the assessment of a tax or a deficiency and provides

for its collection. Subparagraph (b) defines a deficiency as the excess of the amount "which should have been paid" over "the amount already paid." Subparagraph (d) authorizes the Commissioner to make an assessment where "a tax or a deficiency in tax is discovered." Under the statute the authority of the Commissioner to make an assessment is limited to the discovery of a tax or a deficiency. In the present case the full amount of the greatest possible tax was assessed at the time of the filing of the return and was paid during the year 1919. There was, therefore, no tax or deficiency in tax which had not already been discovered, assessed and paid. There was no tax or deficiency "which should have been paid." In a similar case, *Kelley* v. *United States*, 30 F. (2d) 193, the Circuit Court of Appeals for the Ninth Circuit stated:

> "There was some discussion on the argument as to the meaning of a deficiency as defined in the revenue laws, but the entire tax imposed by the government was paid, and, if there was no tax, there could in the nature of things be no deficiency."

The petitioner concedes that the Commissioner has authority to make an assessment of an additional tax, for such constitutes a deficiency within the meaning of Section 250 (b). In this case, however, there was no additional tax or deficiency in tax, but the Commissioner attempted to make an additional assessment to correct an alleged erroneous overassessment previously determined. The law provides for the assessment of an additional tax not previously assessed, but not for the additional assessment of a tax previously assessed and paid. Therefore, the petitioner submits that the Commissioner exceeded the authority conferred on him by statute.

This Court in the *Russell* case, supra, held that an assessment made prior to June 2, 1924, was controlled by the provisions of the Revenue Act of 1921 and not by the provisions of the Revenue Act of 1924. The court below failed to follow the decision in that case and took the position that the definition of a deficiency to be applied is that found in Section 273 of the Revenue Acts of 1924 and 1926. In the course of its

supplemental opinion in the *Oak Worsted Mills*, 38 F. (2d) 699, and followed in this case, the court below stated:

> "It should also be noted that in section 273 of the revenue acts of 1924 and 1926 Congress provided that the commissioner might reverse his action in the case of an abatement, refund, or credit and reassess and collect the amount. It expressly recognizes that in arriving at the correct tax to be collected there may have been additional assessments or collections, abatements, refunds, and credits and clearly indicates that a refund, erroneous or otherwise, does not bar action by the commissioner within the statutory period provided by law. An amount erroneously refunded becomes none the less a tax because of that fact."

The holding of the court below that the definition of a deficiency to be applied to this case is that found in Section 273 of the Revenue Acts of 1924 and 1926 is clearly contrary to the decision of this Court in the *Russell* case, *supra*, and to the clearly expressed provisions of Section 280 of the Revenue Act of 1924 and Section 283 of the Revenue Act of 1926.

In addition to holding that the provisions of Section 273 of the Revenue Acts of 1924 and 1926 applied to this case the court relied on the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Austin Co.* v. *Commissioner*, 35 F. (2d) 910, certiorari denied March 17, 1930, in which case there was a deficiency in tax, as defined by the Revenue Act of 1924 and the case came within the jurisdiction of the Board of Tax Appeals under the provisions of the Revenue Act of 1926. In the present case there was no deficiency. The provisions of the Revenue Acts of 1924 and 1926 do not apply. The Board of Tax Appeals dismissed the petitioner's appeal for lack of jurisdiction.

The Act of 1921, which is applicable to this case, provides for the assessment and collection of a tax and for the refund of an overpayment, but petitioner submits that when a tax has once been paid there can be no further liability for taxes and a refund does not restore the tax and that a refund is not subject to recall as a tax. If recoverable at all it is recoverable as a sum illegally paid out of the Treasury and by resorting

to the courts. In *United States* v. *Bank of Metropolis*, 15 Pet. 377, *supra*, the Court at page 401 stated:

> "But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given, * * *"

The Circuit Court of Appeals for the Ninth Circuit in *Kelley* v. *United States*, *supra*, stated:

> "* * * When once paid, a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.' Cooley on Taxation, 3rd Ed., p. 810. From this view, we know of no dissent."

In *Talcott* v. *United States*, 23 F. (2d) 897, certiorari denied 277 U. S. 604, 48 S. Ct. 601, the Circuit Court of Appeals for the Ninth Circuit held that an amount refunded could be recovered not as a tax but as a sum erroneously paid out of the Treasury and in passing on the counter-claim filed in the case the court stated: "the counter-claim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States."

If the principle applied in the *Kelley* and *Talcott* cases, that a tax once refunded is not recoverable as a tax but by suit by United States, is correct, then the court below erred in this case. The United States prevailed in the *Talcott* case and succeeded in recovering, after the statute of limitations for assessment and collection had expired, an estate tax erroneously refunded under the decision of this Court in *United States* v. *Robbins*, 269 U. S. 315, 46 S. Ct. 148.

There is a direct conflict between the decision in this case and the decisions in the *Kelley* and *Talcott* cases and the writ should be granted for that reason.

Congress has considered the right of the United States to recover a tax erroneously refunded and in Section 610 (b) of the Revenue Act of 1928 provided that an internal revenue tax "which has been erroneously refunded * * * may be recovered by suit brought in the name of the United States." The petitioner submits that Section 610 (b) is to be construed to be retroactive to apply to this case and that the remedy therein provided by Congress is exclusive. The decision of the court below is, therefore, contrary to the clearly expressed intent of Congress that recovery of an erroneous refund may be made only by suit in the name of the United States.

C. *The Provisions of Section 611 of the Revenue Act of 1928 do Not Apply*

AND

D. *Section 611 if Construed to Apply Would be Unconstitutional.*

The decision of the court below with reference to the provisions of Section 611 of the Revenue Act of 1928 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *Burden, Smith & Co.*, 33 F. (2d) 229.

This Court on March 3, 1930, granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on the petition of *Graham & Foster, Co-partners, etc.* v. *Goodcell, Collector*, No. 589, October, 1929, Term, to review the decision of that court with reference to the application and constitutionality of Section 611 of the Revenue Act of 1928. The application and constitutionality of Section 611 are also presented in the petition in this case and counsel submits that the same reasons exist for the allowance of the writ as were presented to the court in the petition of Graham & Foster, Co-partners, etc. The application for the writ in the *Graham & Foster* case was not opposed by the Attorney General.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for and demanding the exercise by this Court of its supervisory powers in order that there may be a final determi-

nation of the authority of the Commissioner of Internal Revenue, after he has once fully exercised the discretion invested exclusively in him to compute the profits tax under Sections 327 and 328 of the Revenue Act of 1918, to thereafter review his previous computation and reach a different conclusion; that there may be a final determination of the authority of the Commissioner of Internal Revenue under the Revenue Act of 1921 after a tax has been assessed, paid and refunded to reassess and collect the amount thereof from the taxpayer as a tax; and that there may be a final determination of the construction and constitutionality of the provisions of Sections 607 and 611 of the Revenue Act of 1928 and that to such ends the writ of certiorari should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

THEODORE B. BENSON,
Attorney for Petitioner.

Of Counsel:

GUIL BARBER,
CHESTER F. WILLIAMS,
WILLIAM MEYERHOFF.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 105

TAFT WOOLEN COMPANY, PETITIONER,

v.

THE UNITED STATES.

BRIEF FOR THE PETITIONER.

FRANK J. ALBUS,
Attorney for Petitioner.

THEODORE B. BENSON,
GUIL BARBER,
WILLIAM MEYERHOFF,
CHESTER F. WILLIAMS,
PERCY A. MATTHEWS,
FREDERICK G. FISCHER,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 105.

TAFT WOOLEN COMPANY, PETITIONER,

v.

THE UNITED STATES.

BRIEF FOR THE PETITIONER.

I.

OPINION OF THE COURT BELOW.

The Opinion of the Court below was rendered by the Court of Claims on March 3, 1930, in the case of this petitioner against the United States, No. J–61 on the records of that court. The opinion has been reported in 38 F(2d), 704, and is a part of the record on this appeal. (R. 16–23.)

II.

JURISDICTION.

This Court has heretofore granted a writ of certiorari under the provisions of Section 3(a) of the Act of February 13, 1925 (45 Stat. 936).

The date of the judgment of the Court of Claims sought to be reversed is March 3, 1930. (R. 23.)

The petition applying for the writ of certiorari was filed on May 7, 1930, and was granted June 2, 1930 (50 S. Ct., 465; 281 U. S., 717), limited to the question of the validity and effect of Section 611 of the Revenue Act of 1928.

III.

QUESTIONS PRESENTED.

Upon the limited basis under which the petition for certiorari was granted in the case, the questions presented are, whether Section 611 of the Revenue Act of 1928 (45 Stat. 791, 875), is to be so construed as to deprive the petitioner of its title to and right to possession and enjoyment of the money illegally collected from it as a tax after the statutory period for collection had expired, and to deprive it of a vested right of action, which it otherwise would have to its recovery; and, if so construed, does the section violate the Fifth Amendment of the Constitution.

IV.

ASSIGNMENT OF ERRORS.

1. The Court of Claims erred in holding that Section 611 of the Revenue Act of 1928 applied retroactively to cover the case of petitioner.

2. The Court of Claims erred in holding that Section 611 of the Revenue Act of 1928 was more than an administrative provision and that it was a withdrawal of the consent of the United States to be sued.

3. The Court of Claims erred in not holding that the petitioner acquired a vested property right and a vested right of action upon the expiration of the period of limitation, and in not holding that Congress did not have the power to pass subsequent legislation to deprive the petitioner of these rights.

4. The Court of Claims erred in rendering judgment in favor of the respondent.

V.

STATEMENT OF THE CASE.

The petitioner, Taft Woolen Company, is a corporation duly organized and existing under the laws of the State of Massa-

chusetts, with its principal place of business at Caryville, town of Bellingham, State of Massachusetts. (R. 16 and 17.)

On June 14, 1919, the petitioner filed its statutory income and excess profits tax return for the calendar year 1918, showing a total tax liability of $429,616.20. This amount, plus interest of $89.55, was all paid to the Collector of Internal Revenue by December 13, 1919. (R. 17 and 18.)

On July 29, 1921, petitioner paid an additional income and excess profits tax for the year 1918 in the amount of $3,262.18, making a total payment for the year of $432,967.93. (R. 18.)

On December 8, 1921, petitioner filed its claim for refund of taxes erroneously assessed and collected, the basis of said claim being an application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. (R. 18.)

On or about October 7, 1922, the Commissioner of Internal Revenue in consequence of the aforesaid application and claim caused plaintiff's tax liability to be recomputed under the relief provisions of said Act and as a result thereof found that the plaintiff had been overassessed the sum of $92,443, which amount was duly refunded to the petitioner. (R. 18.)

On or about March 25, 1924, the Commissioner of Internal Revenue advised plaintiff that a reexamination of its application for special relief showed that the original allowance was in error and that a correct computation of the plaintiff's tax liability under Sections 327 and 328 of the Revenue Act of 1918 indicated an additional tax of $45,398.73. *"The plaintiff was further informed that the additional assessment necessary to correct the excessive overassessment erroneously determined would be listed immediately without giving the usual thirty day notice as provided in Section 250(d) of the Revenue Act of 1921."* (R. 18 and 19.) (Italics supplied.)

Prior to April 18, 1924, the petitioner filed a claim in abatement in the amount of $45,398.73 *on the grounds that the matter was res judicata, that the collection of the tax was barred by the statute of limitations and that the total tax assessable for said year had already been paid in full.* (R. 19.) (Italics supplied.)

On November 25, 1924, the Commissioner rejected the claim

in abatement and advised the petitioner that the comparatives used in the redetermination "are in the aggregate fairly representative in all the material particulars specified in the Act." (R. 19 and 20.)

On June 1, 1925, the petitioner, under protest, paid to the Collector of Internal Revenue at Boston the sum of $45,398.73 and interest demanded thereon in the amount of $1,800.81. (R. 20.)

On or about May 9, 1927, plaintiff filed with the Collector of Internal Revenue its claim for refund of taxes illegally collected for the year 1918 in the amount of $47,199.54, wherein it alleged that the refund should be made for the reason that the collection of the said $47,199.54 was made more than five years after the return of the plaintiff for the year 1918 had been filed.

At the time of the filing of the suit by the petitioner in the Court of Claims on February 21, 1928, more than six months had expired since the filing of the claim for refund of May 9, 1927, and the Commissioner of Internal Revenue had rendered no decision thereon at the time of the filing of said petition. (R. 22.)

The return of the plaintiff for the year 1918 was neither false nor fraudulent with intent to evade the tax, nor had plaintiff signed any waiver in connection with said calendar year, nor any consent in writing with the Commissioner for a later determination, assessment and collection of the tax.

VI.

STATUTES INVOLVED

The statutes involved are Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875); and Section 3226 of the Revised Statutes, as amended (44 Stat. 116).

Section 250(d) of the Revenue Act of 1921 (42 Stat. 277, 265, 266) as applicable here reads in part as follows:

> "* * * If upon examination of a return made under * * * the Revenue Act of 1918, or * * * a tax or a deficiency in tax is discovered, the taxpayer shall be notified

thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *"

Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875) read as follows:

"Sec. 607. Effect of Expiration of Period of Limitations Against United States.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement.

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928 (44 Stat. 116), reads as follows:

"No suit or proceeding shall be maintained in any court

for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim (fol. 6) unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

VII.

ARGUMENT.

1. (a) Sections 607 and 611 of the Revenue Act of 1928 are administrative provisions applying only to the Commissioner of Internal Revenue and do not apply to a case where suit is brought in the courts.

Section 1106(a) of the Revenue Act of 1926 (C. 27, 44 Stat. 9, 113) provides in part as follows:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

It will be noted that Section 1106(a) prevents a "credit or refund" unless the taxpayer has overpaid the tax. Since the

Commissioner of Internal Revenue is the only person authorized to make a "credit" or a "refund," it is quite apparent that the limitation against such credits or refunds in Section 1106(a) had application to him alone. This conclusion is fully sustained by the final action taken in the case of *Adelaide F. Chapman* v. *United States*, 63 Ct. Cls. 424, in which that Court construed Section 1106(a) of the Revenue Act of 1926 as preventing the plaintiff in a suit from recovering barred taxes unless the taxpayer has actually overpaid the tax. Petition for certiorari was filed by the taxpayer and in a brief submitted on behalf of the United States, in which the Solicitor General agreed that the writ should issue, it was said:

> "After the decision in *Bowers* v. *New York and Albany Lighterage Company, supra*, was handed down and it was disclosed that the Court of Claims was in error in holding that the claim of the United States had not been barred, and on March 31, 1927, the petitioner filed a motion for new trial, which was overruled October 24, 1927. Section 1106(a) was brought to the attention of the Court of Claims in connection with that motion, although the record does not disclose it, and the action of the Court of Claims in overruling the motion can only be explained on the theory that it held that Section 1106(a) operated to prevent petitioner from obtaining a refund of the tax paid notwithstanding that when paid its collection was barred by the statute of limitations.
>
> "The phrase 'but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax,' literally construed, may mean that where a tax has been paid which was barred by the statute of limitations when paid, refund shall nevertheless be denied unless the taxpayer has overpaid the tax in the sense of paying more than was justly due without regard to the statute of limitations.
>
> "Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in *Graham* v. *Dupont*, *supra*, or prevent distraint proceedings by injunction and may be compelled by the Colector to pay a tax the collection of which is barred by the statute of limitations,

and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

The judgment of the Court of Claims was vacated and the case remanded to enter judgment for the taxpayer. October term, 1928, 49 S. Ct. p. 7; 278 U. S. 660. (See also *Ellay Co.* v. *Bowers*, 25 F(2d), 637; certiorari denied 48 S. Ct. 601.)

The Commissioner of Internal Revenue also was of the opinion that Section 1106(a) of the Revenue Act of 1926 merely limited his right to make refunds and credits of amounts collected after the statutory period for collection had expired and that it did not prevent recovery in the courts. In I. T. 2382, C. B. VI-2-102, issued during the Fall of 1927, the Commissioner of Internal Revenue said:

"Many inquiries are being received both from within and without the Bureau as to the action which the Bureau should take in making refunds as a result of the decision of the Supreme Court in the case of *Bowers* v. *New York & Albany Lighterage Company*. Great uncertainty exists as to the extent and application of the decision of the Supreme Court. It has been suggested that the *New York & Albany Lighterage Company* decision may have no application to cases where bonds were filed or where claims in abatement were filed, *and that, in view of Section 1106 of the Revenue Act of 1926, the decision should be limited to refunds resulting from court decisions and has no application to refunds by the Commissioner*. Furthermore, Section 1106 was not raised in the *Albany Lighterage Company* case and was not considered in connection with the confession of error made by the Government in the *Taxaway Mills* case before the Supreme Court (47 S. Ct. 471). The subsequent action of the Court of Claims raises grave doubt as to the application of the *Albany Lighterage Company* decision to other cases in view of Section 1106.

"In view of the great uncertainty as to the whole matter, it is believed that no action toward making refunds should be taken by the Bureau in reliance upon the *Albany Lighterage Company* decision unless and until the situation

is clarified by further court decisions or by legislative action. The problem is already under consideration by the Joint Committee on Internal Revenue Taxation, and it will be presented to the Congress as soon as it convenes for such action toward a clarification of the situation as it deems proper."

The above statement by the Commissioner of Internal Revenue was an invitation by the Commissioner to Congress to pass legislation to clarify his power in making refunds and credits in cases where sums had been collected after the statutory period for collection had expired. Congress answered the invitation of the Commissioner of Internal Revenue by enacting Sections 607 and 611 of the Revenue Act of 1928. By Section 607 Congress provided that any amount collected after the expiration of the period of limitation properly applicable thereto either before or after the passage of the Revenue Act of 1928 shall be considered an overpayment and shall be refunded to the taxpayer if claim therefor is properly filed. In other words, Section 607 merely removed the bar which Section 1106(a) of the Revenue Act of 1926 had imposed upon the Commissioner and made it possible for him to make refunds and credits of amounts collected after the statutory period had expired provided claim for refund was properly filed. This Section had no application to suits in Court since the *Chapman* case, *supra*, clearly shows that the authority of the Court to allow recovery had not been curtailed by Section 1106(a) of the Revenue Act of 1926.

Section 611 of the Revenue Act of 1928 is merely a limitation on Section 607 and provides that in a case where an assessment was made prior to June 2, 1924, and if a claim in abatement was filed, and if the collection of any part of the tax was stayed, then the payment of such part was not to be considered an *overpayment under the provisions of Section 607*. But since Section 611 was merely a limitation upon Section 607 and as Section 607 had no reference to suits in Court it follows as a matter of course that Section 611 likewise had no reference to suits in Court. It was so held in *Diamond Alkali Co.* v. *Heiner*, 39 F. (2d) 643.

(b) SECTION 611 OF THE REVENUE ACT OF 1928 DID NOT WITHDRAW THE CONSENT OF THE UNITED STATES TO BE SUED IN CASES WHERE MONEY WAS COLLECTED AS TAXES AFTER THE STATUTORY PERIOD FOR COLLECTION HAD EXPIRED.

The Government contends that by Section 611 of the Revenue Act of 1928 Congress has withdrawn the consent of the United States to be sued in the Courts in cases falling within the purview of that Section. As already pointed out Section 611 is merely a limitation upon Section 607. Section 607 was an enlargement of the power of the Commissioner of Internal Revenue to make refunds or credits of amounts collected after the statutory period for collection had expired. The *Chapman* case, *supra*, showed that the Courts did not need the additional power which Section 607 gave to the Commissioner of Internal Revenue as they already had it. Since, therefore, Sections 607 and 611 were merely the restoration of authority in the one case and the limiting of that authority under certain conditions in the other case, how can it be contended that these Sections withdrew the consent of the United States to be sued? The word "Court" does not appear in Sections 607 and 611, and there is no statement in either of these Sections to the effect that the right of the petitioner to sue has been curtailed. The jurisdiction of the Court of Claims to entertain the suit of the petitioner was established by the so-called Tucker Act, passed in 1883, which became Section 145 of the Judicial Code and which now appears as Section 250 of Title 28 of the Code of Laws of the United States of America. The question of the jurisdiction of the Court of Claims in cases of this type is no longer in controversy. *Dooley* v. *United States*, 182 U. S. 222; *United States* v. *Emery, Bird, Thayer Realty Company*, 237 U. S. 28. The petitioner acquired its right to bring the suit in connection with Section 3226 of the Revised Statutes as amended. Whenever Congress intended to change or modify the provisions of Section 3226 of the Revised Statutes it specifically referred to that section and set forth the particulars in which it was amended. See

Revenue Act of 1921, Chap. 136, Sec. 1318, 42 Stat. 315; Revenue Act of 1924, Chap. 234, Sec. 1014, 43 Stat. 343; Revenue Act of 1926, Chap. 27, Sec. 1113, 44 Stat. 9. Certainly if Congress by any provision of the Revenue Act of 1928 intended to amend Section 3226 specific reference would have been made to this section in the Revenue Act of 1928. Sections 3220, 3228, and 3176 of the revised statutes were amended by the Revenue Act of 1928. See Section 619 of the Revenue Act of 1928. It will be noted that specific reference is made to these sections of the revised statutes and amendments enacted in connection therewith. Certainly if Congress intended to amend Section 3226 it would have appeared specifically as an amendment in the Revenue Act of 1928.

Any Government "of the people, by the people, for the people" will afford its citizens a proper judicial tribunal wherein to fairly litigate wrongs committed by that Government against its citizens, and when that consent has become a matter of settled law, certainly the courts will not by implication determine such consent to have been withdrawn. Such a conclusion should be reached only if the language employed permits of no other construction. Sections 607 and 611 of the Revenue Act of 1928 are not only devoid of any clear language to show a withdrawal of the consent of the United States to be sued but on the other hand they clearly indicate an intent merely to apply to the powers of the Commissioner of Internal Revenue.

Courts of justice have no jurisdiction to make exceptions to a statute, nor to add to the exceptions which the legislature has made, as this would be legislating. Where the language of an act is explicit, it is not for the court to change it by construction based upon some supposed legislative policy. It is not for the court to say that it shall be so construed as to embrace other cases because no good reason can be assigned why they were excluded from its provisions. If the meaning of the legislature is plain, it must be obeyed.

Vol. 4, Ency. of U. S. S. Ct. Reps. p. 228.
United States, et al. v. *Missouri Pac. R. Co.*, 49 S. Ct. 133; 278 U. S. 269.

The rule was tersely stated in *United States* v. *Hartwell*, 6 Wall., 385, 396 (18 L. Ed. 830):

> "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."

This is also the recognized rule of the English courts. In one of the English decisions Lord Denman said the court was bound to look to the language employed and construe it in its natural and obvious sense, even though that was to give the words of the act an effect probably never contemplated by those who obtained the act and very probably not intended by the Legislature which enacted it.

The King v. *The Commissioners*, 5 A. and E. 804, 816.
See also, *United States* v. *Lexington Mill Co.*, 232 U. S., 399, 34 S. Ct. 337, 58 L. Ed., 658, L. R. A. 1915B, 774.
Caminetti v. *United States*, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442; L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

The petitioner wishes to call the attention of this court to the briefs Amici Curiae filed in the case of *R. E. Graham and E. E. Foster* v. *Rex. B. Goodcell*, 36, October term, 1930, in which the foregoing propositions are discussed in all their detail.

2. (a) IF IT BE HELD THAT CONGRESS INTENDED BY THE ENACTMENT OF SECTION 611 OF THE REVENUE ACT OF 1928 TO DEPRIVE THE PETITIONER OF ITS RIGHT TO RECOVER THE SUM COLLECTED AFTER THE STATUTORY PERIOD FOR COLLECTION HAD EXPIRED, THEN IT IS CONTENDED THAT SUCH ATTEMPT IS UNCONSTITUTIONAL AND VOID IN THAT IT DEPRIVES THE PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

There is a fundamental distinction between limitation statutes that merely bar the remedy and those which also extinguish the liability. General limitation statutes are of

the former type and their expiration afford to the defendant a mere remedy, namely, the setting up of the defense of the statute of limitations. Since such a statute of limitations affects the remedy only and does not destroy the liability the defendant acquires no constitutional rights of protection and it is within the power of the legislature to alter, amend, or even completely remove the bar of the Statute of Limitations. However, the petitioner shall show that with respect to the latter type of limitation statutes the expiration of the specified time not only bars the remedy but extinguishes the liability and gives to a citizen a vested property right which under the Constitution of the United States is fully protected against any subsequent legislation of Congress.

In support of the above contention the petitioner relies upon no less authority than decisions of this court. In the case of *Toxaway Mills* v. *United States*, 61 Ct. Cls. 363, decided by the Court of Claims under date of December 7, 1925, that Court applied the rule that the bar of the Statute of Limitations found in Federal Tax Acts merely barred the remedy and did not destroy the liability; consequently, the claimant could not, as a plaintiff, sue to recover taxes alleged to have been collected after the bar of the Statute of Limitations since this matter could be raised only as a defense. This theory of the Court of Claims was exploded by this Court in the cases of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, and *Graham* v. *du Pont*, 262 U. S. 234. The Solicitor General of the United States thereupon confessed error in the *Toxaway Mills* case and this Court remanded the case to the Court of Claims with instructions to enter judgment in favor of the plaintiff. 273 U. S. 781. This case in itself shows a distinction between general statutes of limitations and the time limitations as specified in the various revenue acts, since if there is no distinction then the conclusion of the Court of Claims to the effect that the bar of the statute can be raised only as a defense was correct.

This Court recognized the distinction referred to above in the case of *Central Vermont Railway* v. *White*, 238 U. S. at p. 511, when it said:

> "But matters of substance and procedure must not be confounded because they happen to have the same name.
>
> "For example, the time within which a suit is to be brought is treated as pertaining to the remedy. *But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability.*" (Italics supplied.)

And in the case of *Eberhart* v. *United States*, 204 Fed. Rep. pp. 890–891, the Court stated in clear terms the very distinction for which the petitioner now contends. In the course of the opinion the Court said:

> "An act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates, * * * because such limitations are conditions of the liability itself and not limitations of the remedy only."

In this connection see also *Bashara* v. *Hopkins*, 290 Fed. 592; affirmed 295 Fed. 319; Certiorari denied, 265 U. S. 584; 44 S. Ct. 459; *Danzer & Co.* v. *Gulf & Ship Island R. R. Co.*, 268 U. S. 633.

Similarly, in the case of *United States* v. *John Barth Company*, 27 Fed. (2d) 782, 784 the Court said:

> "In general, it may be said that statutes of limitation bar only the remedy, but the different statutory enactments on the subject of time limitations upon the determination and assessment of income taxes culminating in the Act of 1926, *indicate an intent not merely to bar the remedy but to extinguish entirely all liabilty for the tax, where its determination and assessment is not made within five years after filing the return.*" (Italics supplied.)

The statement of this Court in the case of *Russell et al.* v. *United States*, 49 S. Ct. 121, 123; 278 U. S. 181, shows that it is in full accord with the principle of law announced in the cases referred to above. This Court said:

"Manifestly, but for Section 278 (Revenue Act of 1924), petitioners would be *free from liability under the five year limitation* in the act of 1918, continued by the act of 1921. If Section 278 refers only to assessments made after June 2, 1924, petitioners are not liable.

"If an assessment made before that date comes within the ambit of Section 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—*would extend for some five years a liability which had almost expired. United States* v. *Magnolia Petroleum Company*, 276 U. S. 160, 48 S. Ct. 236, 72 L. Ed., 509, declares, 'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.'" (Italics ours.)

It will be noted this Court stated that if it were not for Section 278 of the Revenue Act of 1924 the petitioners would be *free from liability* under the five year limitation in the Act of 1918 continued by the act of 1921. The words "free from liability" are not ambiguous. They can be construed to mean but one thing, namely, upon the expiration of the five year limitation period the liability of the petitioner would have been completely extinguished. Furthermore, this Court said that if Section 278 of the Revenue Act of 1924 were construed to apply retroactively it would extend for some five years the liability which had *almost expired*. The words "almost expired" means that the expiration of time had almost extinguished the liability. They could reasonably have no other meaning.

Other authorities could be cited to the same effect. The cases referred to seem to establish beyond any doubt that the time limitation provisions found in the various Revenue Acts not only bar the remedy at the expiration of the period specified but that they also extinguish the liability.

(b) UPON THE EXPIRATION OF THE TIME LIMITATION PROVIDED FOR BY THE REVENUE ACTS, THE PETITIONER ACQUIRED A VESTED PROPERTY RIGHT.

Kent, in his Commentaries, Vol. 4, page 202, defines a vested right as follows:

> "A vested right is an immediate right of present enjoyment, or a present, fixed right of future enjoyment."

In the case of *Pearsall* v. *Railway Company*, 161 U. S. 646, this Court said:

> "Rights are said to be vested, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

In the case of *Gladney* v. *Syndor*, 172 Mo. 318, the Court said:

> "Vested rights may be created either by the common law, *by statute*, or by contract, and it makes no difference as to the method of their creation, *they are entitled to the same protection.*" (Italics supplied.)

When we consider the above definitions there appears to be no doubt that when the passing of time under the various Revenue Acts extinguished the liability of this petitioner with respect to its tax liability for the year 1918 it acquired a vested right of present enjoyment in the realization that no further liability remained for that year and this realization, upon the expiration of the time limitation under the statute, was just as effectual as though the petitioner had taken its money to the Collector of Internal Revenue before the expiration of the period and removed the liability by a payment in cash. In the latter case the liability would have been removed by payment in cash while in the former case the liability was removed by operation of law. The result in either case would be exactly the same, namely, the extinguishment of the liability. It seems fundamental that a taxpayer who paid his liability in cash thereby acquired a vested right not to be called upon again to satisfy the same liability. For the same reason the taxpayer whose liability is extinguished by operation of law acquires a vested right of present enjoyment in knowing that

the liability which had been extinguished is forever gone. The petitioner shall show that such a right is fully protected under the Fifth Amendment of the Constitution of the United States.

(c) IF SECTION 611 IS SO CONSTRUED AS TO DEPRIVE PETITIONER OF ITS PROPERTY AND ITS VESTED RIGHT OF ACTION OF RECOVERY, IT WOULD BE CONTRARY TO THE FIFTH AMENDMENT OF THE CONSTITUTION.

If this Court determines that Congress intended by Section 611 to deprive petitioner of its property and also of its vested right of action of recovery, this Section would be violative of the Fifth Amendment, and void so far as petitioner's case is concerned. The decisions of this Court sustain the petitioner in this contention.

Mr. Justice Chase, in the case of *Calder* v. *Bull*, 3 Dall. 385, at p. 388 (1 L. Ed. 648), said:

> "There are acts which the Federal or State Legislatures can not do, without exceeding their authority, * * * as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I can not call it a law), contrary to the great first principles of the social compact, can not be considered a rightful exercise of legislative authority * * * or a law that takes property from A. and gives it to B; it is against all reason and justice, for a people to intrust a Legislature with such powers; and therefore, it can not be presumed that they have done it."

To apply Section 611 to petitioner's case, notwithstanding Section 715, the Separability Clause of the Revenue Act of 1928, would render that section unconstitutional.

Nichols v. *Coolidge*, 274 U. S. 53; 52 A. L. R. 1081.

Blodgett v. *Holden*, 275 U. S. 142.

Untermyer et al. v. *Anderson, Collector of Internal Revenue*, 276 U. S. 440; 48 S. Ct. 353.

Justice demands that petitioner be permitted to assert its legal and constitutional rights on reasonably equal terms with the respondent before an impartial judicial tribunal.

Atchison, Topeka & Santa Fe Railway Company v. *O'Connor*, 223 U. S. 280.

Christie-Street Commission Co. v. *United States*, 136 Fed. 326, 69 C. C. A. 464.

Emery, Bird, Thayer Realty Co. v. *United States*, 198 Fed. 242 (affirmed 237 U. S. 28).

Fidelity & Columbia Trust Co. v. *Lucas*, 7 F. (2d), 146.

In the case of *Rock Island Ry. Company* v. *United States*, 254 U. S. at page 143, this Court said that men must turn square corners when they deal with the Government. Should not the Government also be required to turn square corners when it deals with its citizens?

The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. *Chelentis* v. *Luckenback S. S. Co.*, 247 U. S. 384.

> "Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or *deprive one of a vested property right*. If the changing or repealing statute *leaves the parties a substantial remedy, the legislature does not exceed its authority*. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. * * * The right to compensation was a vested property right." (Italics supplied.)

Ettor v. *Tacoma*, 228 U. S. at pp. 155, 156 and 158.

Smallwood v. *Gallardo*, 275 U. S. 56; 48 S. Ct. 23.

In the early case of *Dartmouth College* v. *Woodward*, 4 Wheat, 518, this Court laid down the rule that where individuals have acquired absolute or vested rights under a statute a subsequent repeal can not divest these rights.

And in the case of *Pritchard* v. *Norton*, 106 U. S. 132, this Court said:

> "A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law it is not competent for the legislature to take it away."

In the case of *Memphis* v. *United States*, 97 U. S. p. 293, this Court said:

> "We do not deny that it is competent for a legislature to repeal an Act which when it was passed was a mere gratuity, *if while it was in existence no vested rights have been acquired under it or in virtue of it.*" (Italics supplied.)

A similar conclusion was reached by the Court in *United States* v. *Henrich*, 12 Fed.(2d) 940, viz:

> "My conclusion here is that Congress can not enact a law that would destroy, impair or injuriously affect rights that have vested under a former constitutional enactment, and that to enforce the Act of June 4, 1920, against the defendant and require him again to pay for his property would be in violation of the constitutional guarantee heretofore cited." (Fifth Amendment of the Constitution of the United States.)

A law can be repealed by the lawgiver, but the rights which have been acquired under it while it was in force do not thereby cease. This was the rule of the civil law and has been strictly adhered to in England where there is no express restriction upon legislative power. *County of McCracken* v. *Mercantile Trust Company*, 84 Ky. 314; 1 S. W. 585.

In the case of *Crump* v. *Guyer*, 157 Pac. 321; 2 A. L. R. 331, the Court reached the same legal conclusion, and then said:

> "To hold otherwise would leave us at sea and place it in the power of the legislature at will to disturb, and even destroy by subsequent legislation rights which had accrued under existing laws."

By what right does the United States retain this illegally collected sum, or what statute creates and imposes any new liability upon this petitioner, or precludes it from recovering back the illegally collected sum of money, or what law or statute of Congress could deprive petitioner of its property and authorize the United States to keep and retain its property in violation of the Fifth Amendment of the Constitution? Certainly Section 611 did not confer such right and authority in the respondent.

This Court, in the case of *De Lima* v. *Bidwell*, 182 U. S. p. 199, speaking through Mr. Justice Brown, said:

> "As the action in this case was brought March 13, 1900, eleven days before the act was passed, *the right to recover the money sued for could not be taken away by a subsequent act of Congress.*
>
> "Plaintiffs sue in assumpsit for money which the Collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action, would be beyond its power. In any event, it should not be interpreted so as to make it retroactive."

To the same effect is *Lincoln* v. *United States*, 202 U. S. p. 485. In this connection we invite the Court's attention to the arguments presented by the appellants and the United States in this latter case, at pp. 485–495, for the reason that many of the questions there discussed are similar, if not identical, to most of the questions involved in the instant case.

(d) CONGRESS WAS WITHOUT POWER TO EXTEND THE STATUTORY BAR, IN PETITIONER'S CASE, AFTER IT HAD FALLEN AND PETITIONER HAD ACQUIRED A VESTED PROPERTY RIGHT.

A claim for abatement, by no stretch of the imagination, can be construed so as to extend the statute of limitations, except, of course, such claims for abatement as came within the scope of Sections 214 and 234 of the 1918 and 1921 Revenue Acts.

As claims for abatement were recognized prior to the enactment of Section 250(d) of the Revenue Act of 1921 and have

been directly legislated on in that Section, that Act, for the first time, specifically provided that taxes should be determined and assessed within five years after the return was filed, *unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.* *Bowers, etc.* v. *New York & Albany Lighterage Company, et als.*, 273 U. S. 346, at p. 351; 47 S. Ct. 389, at pp. 390–391). This Court held in the case of *Botany Worsted Mills* v. *United States*, 278 U. S. 282; 49 S. Ct. 129:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

Moreover, if a claim for abatement in all cases "stayed" the running of the statute, the enactment of Section 611, of the Revenue Act of 1928, would be of no significance whatsoever. (*Danzer & Co.* v. *Gulf & Ship Island R. R. Co.*, *supra;* and *Bessemer Coal & Coke Co.* v. *Heiner*, 39 F. (2d), 492.)

Under Section 250(d) of the Revenue Act of 1921, as construed by this Court in the case of *Bowers, etc.* v. *New York and Albany Lighterage Company, et al.*, 273 U. S. 346, the claim of the United States for the alleged additional tax against this petitioner was barred by the operation of the limitation statute prior to the time when it was collected and any collection by means of distraint proceedings instituted after the five year period was unlawful.

Upon its payment under protest and duress when barred it became a tax illegally collected, and the petitioner was entitled to its refund and to maintain a suit to recover the amount paid.

Under the decision in *Graham* v. *du Pont*, 262 U. S. 234, the petitioner could not have maintained an action to restrain collection of the tax on the ground that it was barred by the Statute of Limitations. It was compelled to pay the additional tax with the right then to demand a refund.

After its claim for refund was made, the petitioner filed its suit in the Court of Claims, and while its suit was pending Section 611 of the Revenue Act of 1928 was enacted.

Section 611 should not be interpreted to be retrospective in operation so as to destroy a right to recovery in a case where a suit was properly filed and was pending at the time of the passage of the Revenue Act of 1928 because, if so construed, the result would be to discriminate between the petitioner, whose case had not proceeded to final judgment, and those taxpayers whose cases had proceeded to judgment as in the cases of *Bowers* v. *New York & Albany Lighterage Company et al. supra*, and *Russell* v. *United States, supra*. Furthermore such construction would deprive the petitioner of a vested property right to recover by judgment the amount of money sued for which would be in violation of the Fifth Amendment.

It is further contended that a subsequent Congress does not have the power to declare that money which a former Congress, and this Court, have said belongs to a taxpayer because unlawfully and illegally collected by duress, shall be retained by the Treasury Department.

3. THE LEGAL PRINCIPLES ESTABLISHED BY THE CASES OF UNITED STATES v. HEINSZEN, 206 U. S. 370; RAFFERTY v. SMITH, BELL & COMPANY, 257 U. S. 226; AND CAMPBELL v. HOLT, 115 U. S. 620, DO NOT APPLY TO THE CASE OF THIS PETITIONER.

The lower Courts that have decided in favor of the Government on the issue found in the case of this petitioner relied principally upon the three cases cited in the above heading. It is submitted that the principles announced in these cases have no application to the case of this petitioner. The cases of *United States* v. *Heinszen* and *Rafferty* v. *Smith, Bell & Company*, merely raised the question of the right of Congress to pass an act legalizing and ratifying the imposition and collection of duties by the authorities of the United States in the Philippine Islands prior to the passage of the Act. The only question of constitutional law involved in this issue was whether or not Congress could pass a law imposing a tax or a duty retroactively. There is no doubt but that Congress has such power. However, the application of Section 611 of the Revenue Act

of 1928, if it be held to be an attempt to deprive this petitioner from recovering, presents an entirely different question of constitutional law. The act under consideration in the *Heinszen* case created an original liability retroactively. On the basis of the argument of the Government, Section 611 would not result in the creation of an original liability but would be an attempt to recreate a liability that had been created by a prior Revenue Act, which liability had been completely extinguished by operation of law upon the expiration of the period specified in the statute.

This distinction is clearly shown by this Court in the case of *Forbes Boat Line* v. *Commissioners, etc.*, 258 U. S. 338, 339. When speaking through Justice Holmes the Court said:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of *United States* v. *Heinszen & Co.*, 206 U. S. 370; (*Rafferty* v. *Smith, Bell & Company*, 257 U. S. 226), which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. *Wagner* v. *Baltimore*, 239 U. S. 207, 216, 217. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act."

The case of *Campbell* v. *Holt, supra*, involved the breach of a common law liability on a contract. This Court held that the expiration of the bar of limitations applied to the remedy only, and did not extinguish the liability. Consequently, subsequent legislation affecting the remedy did not deprive the citizen of his property without due process of law. It is quite apparent that the principle in the case of *Campbell* v. *Holt* does not apply to the case of this petitioner. The Court

recognized the distinction in the case of *Eberhart* v. *United States*, *supra*, when it said (page 511):

> "They (statutes of time limitation that not only bar the remedy but extinguish the liability) are excepted from the rule announced in *Campbell* v. *Holt*, 115 U. S. 628; 6 Sup. Ct. 209; 29 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the legislature may not overthrow at pleasure by extending the time for collecting it."
>
> See also *Danzar* and *Bashara* cases, *supra*.

It is submitted, therefore, that the principles of law found in the three cases relied upon by the lower Courts have no application to the case of this petitioner and are not authorities to defeat its vested property rights.

CONCLUSION.

In conclusion the petitioner contends that Sections 607 and 611 of the Revenue Act of 1928 are administrative provisions affecting only the Commissioner of Internal Revenue; that they in no sense can be construed as a withdrawal by the United States of its consent to be sued; that upon the expiration of the time specified in the statute the petitioner acquired vested property rights, subject to the protection of the Fifth Amendment of the Constitution of the United States, and that it is beyond the power of Congress to affect those rights by any subsequent legislation.

Respectfully submitted,

FRANK J. ALBUS,
Attorney for Petitioner.

THEODORE B. BENSON,
GUIL BARBER,
WILLIAM MEYERHOFF,
CHESTER F. WILLIAMS,
PERCY A. MATTHEWS,
FREDERICK G. FISCHER,
Of Counsel.

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No. 105

In the Supreme Court of the United States

OCTOBER TERM, 1929

TAFT WOOLEN COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 881

TAFT WOOLEN COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The questions presented in this case are identical with the two questions involved in *Oak Worsted Mills, Petitioner* v. *United States*, No. 880, October Term, 1929, which is being submitted to the Court together with the petition in this case.

For the reasons stated in the Memorandum filed by the United States in the *Oak Worsted Mills case*, we do not oppose a review by this Court of the question of the effect and validity of Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (R. 4.).

The other question raised by the petition for certiorari, we submit, does not warrant the consideration of this Court. Our reasons for this conclusion are set forth in the Memorandum above referred to. We submit that the decision of the Court of Claims

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upon this second question was correct, and that there is no real conflict of authority upon this question.

Although the United States does not oppose the petition for certiorari, we suggest that the Court limit its review to the question of the effect and validity of Section 611 of the Revenue Act of 1928.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

CHARLES B. RUGG,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

GEORGE H. FOSTER,
ERWIN N. GRISWOLD,
BRADLEY B. GILMAN,
Attorneys.

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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 323

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, MICHIGAN, TRUSTEE OF THE ESTATE OF WELLINGTON R. BURT, DECEASED, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 29, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,245)

(35,245)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 4, 1930

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 323

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, MICHIGAN, Trustee of the Estate of Wellington R. Burt, Petitioner

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO COURT OF CLAIMS

The petition of Second National Bank of Saginaw, Saginaw, Michigan, Trustee of the Estate of Wellington R. Burt, deceased, respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

Facts

Petitioner is a corporation and executor and trustee of the Estate of Wellington R. Burt, who died March 2, 1919. On April 1, 1918 the said Burt made an income tax return showing a tax due in the sum of $65,428.51 for the calendar year 1917, which was paid in 1918. In January 1921 the Commissioner of Internal Revenue assessed additional taxes against said Burt for the year 1917 in the sum of $28,336.07. On February 17, 1921, the plaintiff, as executor of the Estate of said Burt, filed a claim in abatement of the said tax of $28,336.07 on several grounds. On November 23, 1922 the Commissioner credited against said assessment the sum of $804.91, being the amount of an overpayment of income taxes for the year 1920, leaving a balance of $27,[fol. 2] 531.16 still due and unpaid. On May 24, 1923 the Commissioner rejected the claim in abatement, and on October 2, 1923 demanded of Plaintiff the balance of the additional assessment for 1917, together with interest there-

on, making a total of $31,729.66. Plaintiff paid this amount under protest on October 12, 1923 to the Collector of Internal Revenue. (R. 10).

On July 11, 1927 the plaintiff filed a claim for refund of taxes paid for the year 1917 in the sum of $32,534.57, being the amount of said additional assessment, together with interest paid thereon, on the ground that the same had been illegally collected after the statute of limitations had expired. The claim for refund was rejected by the Commissioner of Internal Revenue on September 1, 1928 and the petition in the Court of Claims was filed on February 4, 1929. (R. 1 and 11).

The Court of Claims made the following find of fact:

"Upon receipt of a claim in abatement it was the common practice to hold up the collection of an additional assessment The Collector of Internal Revenue acted in accordance with this practice in this case and in the exercise of his discretion actually held up the collection of the additional assessment and forwarded the said claim to the Commissioner of Internal Revenue in due course. The Collector made no further endeavor to collect the amount covered by the claim in abatement in this case until after the claim had been finally adjusted by the Commissioner of Internal Revenue". (R. 11).

The petition was based upon the ground that the amount of tax and interest referred to above ($32,534.57) was collected after the expiration of the statutory period allowed therefor by Section 9 (a) of the Revenue Act of 1916 and Section 250 (d) of the Revenue Act of 1921.

Statutes Involved

The statutes involved are Section 250 (d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266) and Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875).

Section 250 (d) of the Revenue Act of 1921 provides in part as follows:

[fol. 3] "The amount of income, excess profits, or war profits taxes due under any return made under * * * prior income, excess profits, or war profits tax acts * * * shall be determined and assessed within five years after

the return was filed * * * and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax acts * * * shall be begun, after the expiration of five years after the date when such returns was filed * * * ."

The five year period of limitations on assessment and collection provided for in the above section was reenacted in Section 277 (a) (2) of the Revenue Acts of 1924 and 1926.

Section 607 of the Revenue Act of 1928 provides as follows:

"Sec. 607. Effect of Expiration of Period of Limitations against United States.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 611 of the Revenue Act of 1928 provides as follows:

"Sec. 611. Collections Stayed by Claim in Abatement.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Decision

The Court of Claims gave judgment for the defendant and dismissed the petition. The decision was rested by the Court of Claims upon the principles announced by that Court in Oak Worsted Mills v. United States, 36 F. (2d) 529, and Gotham Can Company v. United States, 37 F. (2d)

793. (R. 12). The two cases referred to applied Section 611 of the Revenue Act of 1928 so as to prevent the recovery of taxes collected after the expiration of the statute of limitations.

[fol. 4] Questions Presented

The case presents a number of questions as to the construction and constitutionality of Section 611 of the Revenue Act of 1928. Among the questions presented are the following:

1. Does a proper construction of Section 611 of the Revenue Act of 1928 make it applicable to the case at bar?

2. Has Section 611 of the Revenue Act of 1928 any reference to suits by taxpayers, or does it merely define the authority of officials of the Government in making refunds and credits?

3. Does Section 611 of the Revenue Act of 1928 apply only to cases of voluntary payments and not to payments under protest?

4. Is the word "stay," as used in Section 611 of the Revenue Act of 1928, to be construed as denoting a "legal stay," or does it mean simply "delay"?

5. Is Section 611 of the Revenue Act of 1928 limited in its application to cases where collection of a tax is stayed by or as a result of the filing of a claim in abatement?

6. Are Sections 607 and 611 of the Revenue Act of 1928 to be given a retroactive construction so as to apply to cases arising prior to the enactment of the Revenue Act of 1928?

7. Does Section 611 of the Revenue Act of 1928 deprive the Court of Claims of jurisdiction of Petitioner's suit and Petitioner of its remedy, under Section 145 of the Judicial Code?

8. Is Section 611 of the Revenue Act of 1928 unconstitutional in that:

(a) It exceeds the power conferred upon Congress by the Sixteenth Amendment to lay and collect taxes on incomes, or

(b) Deprives taxpayers of property without due process of law in violation of the Fifth Amendment?

[fol. 5] B

REASONS FOR THE ALLOWANCE OF THE WRIT

I

The questions involved in this case with reference to Section 611 of the Revenue Act of 1928 are substantially the same as those involved in the case of Oak Worsted Mills v. United States, No. 104, October Term 1930, upon which the Court of Claims relied in the case at bar (R. 12), in which case this Court granted writ of certiorari to the Court of Claims on June 2, 1930. Similar questions as to the validity and effect of Section 611 of the Revenue Act of 1928 are involved in the following cases, in which this Court has granted writs of certiorari: Graham v. Goodcell, No. 36, October Term 1930, writ granted March 3, 1930; Magee v. United States, No. 65, October Term 1930, writ granted May 19, 1930; Taft Woolen Co. v. United States, No. 105, October Term 1930, writ granted June 2, 1930.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. K-47, Second National Bank of Saginaw, Saginaw, Michigan, Trustee of the Estate of Wellington R. Burt, Plaintiff, v. The United States, Defendant, and that the said judgment of the Court of Claims may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Second National Bank of Saginaw, Trustee of the Estate of Wellington R. Burt, by W. A. Sutherland, Counsel for Petitioner.

Address of Petitioner's Counsel: Atlanta Trust Co. Bldg., Atlanta, Georgia.

[fol. 6] IN THE COURT OF CLAIMS

No. K—47

SECOND NATIONAL BANK OF SAGINAW, Saginaw, Michigan, Trustee of the Estate of Wellington R. Burt, Deceased, Claimant,

v.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed February 4, 1929

To the Court of Claims of the United States and to the Honorable, the Chief Justice and Judges thereof:

The above-named claimant by this, its petition, respectfully shows:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the United States, engaged in the business of banking, with its principal place of business in the City and County of Saginaw, in the State of Michigan, and have permission granted by the Federal Reserve Board in a manner provided by the Statutes of the United States, to act as executor and trustee.

2. The said Wellington R. Burt died a citizen of the United States and a resident of the State of Michigan on March 2, 1919, leaving a last will and testament under which the claimant is named as executor and trustee. On August 13, 1920, letters testamentary were issued unto the [fol. 7] claimant as executor, and the final account of the claimant having been approved, the Probate Court for the said County of Saginaw, on May 24, 1922, assigned and distributed the assets of the estate to the claimant as trustee under the will of the said Wellington R. Burt, and thereupon the claimant duly qualified as such trustee and succeeded itself as executor, and has since and still does act as such trustee.

3. The claimant has a just claim against the United States for the refund of Thirty-two Thousand Five Hundred Thirty-four and 57/100 ($32,534.57) Dollars, being the

additional taxes and interest thereon paid by it to the Collector of Internal Revenue for the First District of Michigan, at Detroit, Michigan, on the dates hereinafter mentioned, as additional income and surtaxes, and interest thereon, for the calendar year 1917, which said sum was wrongfully assessed and collected by the Commissioner of Internal Revenue of the United States.

4. The provisions of the law under which such wrongful assessment and collection was made are contained in Section 1 of an Act of Congress approved September 8, 1916, entitled "An act to Increase the Revenue and for other Purposes," and known as the Revenue Act of 1916, as amended by Sections 1 and 2 of an Act of Congress approved October 3, 1917, entitled "An act to provide revenue to defray war expenses, and for other Purposes," and known as the Revenue Act of 1917.

5. The provisions of the law under which the claimant claims such refund are contained in Section 9 (a) of the [fol. 8] Revenue Act of 1916, Section 250 (d) of an Act of Congress approved November 23, 1921, entitled "An Act to Reduce and Equalize Taxation, to Provide Revenue and for Other Purposes," and known as the Revenue Act of 1921, and Section 3226 of the Revised Statutes of the United States.

6. Pursuant to the provisions of Section 3173 of the Revised Statutes of the United States, as amended, and of other Acts of Congress made and provided, the claimant on March 15, 1928, and on official form 1040, made to the Commissioner of Internal Revenue its return of income and surtaxes for the said calendar year 1917 and reported thereon the full sum of Sixty-five Thousand Four Hundred Twenty-eight and 51/100 ($65,428.51) Dollars, which said sum was fully paid to the Collector of Internal Revenue for the First District of Michigan, within the time prescribed by law.

7. The Commissioner of Internal Revenue audited and revised the return of income and surtaxes so filed by the claimant, and determined and assessed on the January, 1921, list additional taxes in the amount of Twenty-eight Thousand Three Hundred Thirty-six and 07/100 ($28,-

336.07) Dollars. On February 17, 1921, the claimant filed a claim in abatement of the said sum of Twenty-eight Thousand Three Hundred Thirty-six and 07/100 ($28,336.07) Dollars, which said claim was considered by the Commissioner of Internal Revenue, and by letter dated December 1, 1922, said claim was rejected in full, and said amount was finally rejected by the Commissioner of Internal Revenue by letter dated May 24, 1923.

[fol. 9] 8. The said Collector of Internal Revenue for the First District of Michigan, on or about October 1, 1923, made demand on claimant for the said additional assessment in the sum of Twenty-eight Thousand Three Hundred Thirty-six and 07/100 ($28,336.07) Dollars, which said demand was discharged by the payment of Twenty-eight Thousand Three Hundred Thirty-six and 07/100 ($28,336.07) Dollars, and Four Thousand One Hundred Ninety-eight and 50/100 ($4,198.50) Dollars interest on October 11, 1923.

9. On information and belief the claimant avers that the said sums so paid as original tax and as additional tax to the Collector of Internal Revenue for the First District of Michigan, were by the said official turned over to and deposited in the Treasury of the United States as in the usual course of the business of such official.

10. Pursuant to the provisions of Section 3220 of the Revised Statutes of the United States, as amended, and pursuant to the provisions of other acts of Congress, and on July 2, 1927, the claimant duly filed with the said Collector of Internal Revenue for the First District of Michigan at Detroit, Michigan, a claim for refund in the amount of Thirty-two Thousand Five Hundred Thirty-four and 57/100 ($32,534.57) Dollars, or such greater amount as is legally refundable, purporting to represent the said additional tax paid in the amount of Twenty-eight Thousand Three Hundred Thirty-six and 07/100 ($28,336.07) Dollars, and interest paid thereon. The basis of such claim is that the said additional tax and interest were illegally collected from the claimant after the expiration of the statutory [fol. 10] period in which the Commissioner of Internal Revenue could legally make such collection.

11. The Commissioner of Internal Revenue considered the said claim for refund so filed, and by his letter dated September 1, 1928, advised the claimant that the said claim would be rejected in full. A copy of said rejection letter is attached hereto and marked Exhibit "A."

12. The said sum of Thirty-two Thousand Five Hundred Thirty-four and 57/100 ($32,534.57) Dollars, representing additional tax and interest thereon, so paid to the said Collector of Internal Revenue, is wrongfully withheld from the claimant for the reason that it was collected from the claimant against its will and over its protest, after the expiration of the statutory period allowed therefor by Section 9 (a) of the said Revenue Act of 1916, and Section 250 (d) of the said Revenue Act of 1921, and the said amount so paid is, therefore, illegally withheld from the claimant.

13. The claimant further states that no suit or proceeding for collection of the said taxes has ever been instituted against it within the period of limitation as prescribed by law, nor have any valid waivers been filed by it extending the period for collection beyond that prescribed by law.

14. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. Claimant has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. Claimant is and always [fol. 11] has been, the sole and absolute owner of the claim here presented. Claimant has made no transfer or assignment of such claim or of any part thereof, or of any interest therein. Claimant is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set-offs.

15. The claimant believes the facts as hereinabove stated to be true.

Wherefore the claimant prays judgment against the United States of America upon the facts and law for Thirty-two Thousand Five Hundred Thirty-four and 57/100 ($32,534.57) Dollars, together with interest thereon from

the date of payment, and its reasonable costs and disbursements.

Second National Bank of Saginaw, Trustee of the Estate of Wellington R. Burt, Deceased, by Edward W. Glynn, Vice-President and Cashier. (Seal.) Theodore B. Benson, Attorney for Claimant.

[fol. 12] *Duly sworn to by Edward W. Glynn. Jurat omitted in printing.*

[fol. 13] EXHIBIT "A" TO PETITION

[Seal.] Treasury Department, Washington

Office of Commissioner of Internal Revenue; IT:C; LHR.

Sep. 1, 1928.

Estate of Wellington R. Burt, c/o Second National Bank of Saginaw, Saginaw, Michigan.

SIRS: Your claim for the refund of $32,534.57, additional income tax with interest, assessed for the year 1917, has been examined.

The claim is based upon the statement that the above amount was collected after the Statute of Limitations on collection had expired, and that in accordance with the decision of the United States Supreme Court in the case of Bowers, Collector, v. New York and Albany Litherage Company, the tax, with interest, so collected is refundable.

An examination disclosed that your 1917 return was filed March 25, 1918, and that the additional assessment for $28,336.07 was listed in January, 1921, within five years from the filing date of your return, for which an abatement claim was filed February 17, 1921.

Section 611 of the Revenue Act of 1928 provides that in any case in which an assessment was made prior to June 2, 1924, and within the period of limitation on assessment, and in which a claim in abatement was filed, then the payment of any part of the tax, the collection of which was stayed, shall not be considered an overpayment under the provisions of Section 607 of the same act.

Your claim will, therefore, be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner.

Respectfully, C. B. Allen, Deputy Commissioned, by Charles P. Suman, Head of Division.

[fols. 14 & 15] II. General Traverse—Filed March 16, 1930

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

L. A. S.

III. Submission of Case

On February 10, 1930, this case was submitted on merits, without argument by Mr. Theodore B. Benson, for plaintiff, and by Mr. Lisle A. Smith, for defendant.

[fol. 16] Special Findings of Fact, Conclusion of Law Opinion of the Court by Green, J.—Filed April 30, 1930

Mr. Theodore B. Benson for plaintiff.

Mr. Lisle A. Smith, with whom was Mr. Charles F. Kincheloe, for defendant.

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of the parties, makes the following

Special Findings of Fact

Plaintiff is a corporation, and executor and trustee of the estate of Wellington R. Burt, who died March 2, 1919. On April 1, 1918, he made an income-tax return showing a tax due in the sum of $65,428.51 for the calendar year 1917, which was paid during the same year. Afterwards the

Commissioner of Internal Revenue audited and revised this return and in January, 1921, assessed additional taxes against said Burt in the sum of $28,336.07. On February 17, 1921, the plaintiff, as executor of the estate of said Burt, filed a claim in abatement of the said tax of $28,336.07 on several grounds. On November 23, 1922, the commissioner credited against said assessment the sum of $804.91, being the amount of an overpayment of income taxes for the year 1920, leaving a balance of $27,531.16 still due and unpaid. On May 24, 1923, the commissioner rejected the claim for abatement of said tax, and on October 2, 1923, demanded of plaintiff the balance of the additional assessment for 1917, to wit $27,531.16, together with interest thereon amounting to $4,198.50, a total of $31,729.66, and plaintiff, under protest, on October 12, 1923, paid said amount to the collector of internal revenue.

On October 25, 1923, the plaintiff filed a claim for refund of taxes assessed against said Burt for 1917 and 1918 in the sum of $109,054.56, and on October 1, 1925, plaintiff filed a second claim for refund, claiming a reduction of tax liability for the year 1917 in the sum of $17,538.50 and a refund of the sum of $97,963.08 on the taxes for the year 1917. No evidence was introduced to support the specifications made in either of these claims for refund.

[fol. 17] On March 31, 1926, the commissioner rejected the claim for refund for the year 1917 in its entirety, and on July 11, 1927, the plaintiff filed a third claim for refund of the taxes of 1917 in the sum of $32,534.57, being the amount of the said additional assessment, together with interest paid thereon, on the ground that the same had been illegally collected after the statute of limitations had expired, and stated that:

"This claim amends and supplements all claims for refund previously filed for this year."

On September 1, 1928, the commissioner rejected the third claim for refund.

The parties have stipulated and the court finds that if the plaintiff is entitled to recover anything in this action, the plaintiff is entitled to recover no greater sum than $31,729.26, with interest thereon from October 12, 1923; and also:

Upon receit of a claim in abatement it was the common practice to hold up the collection of an additional assessment. The collector of internal revenue acted in accordance with this practice in this case and in the exercise of his discretion actually held up the collection of the additional assessment and forwarded the said claim to the Commissioner of Internal Revenue in due course. The collector made no further endeavor to collect the amount covered by the claim in abatement in this case until after the claim had been finally adjusted by the Commissioner of Internal Revenue.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

This is an action to recover taxes which the evidence shows were collected after the period of limitations had expired.

Three claims for refund were filed, but the case turns entirely upon the third claim for refund, which was based on the fact that the taxes sought to be refunded had been collected after the expiration of the period of limitations.

The facts as stipulated by the parties and set out in the findings show that the taxes in controversy were assessed within the period of limitations, that a plea of abatement was then filed by plaintiff, and a little over two years thereafter the claim for abatement was denied. In the meantime a credit had been made on the tax in question of an overpayment on a tax for a later year.

The findings further show that upon receipt of a claim in abatement it was the common practice to hold up the

collection of an additional assessment and that the collector of internal revenue acted in accordance with the practice [fols. 18 & 19] in this case and made no endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue.

The facts bring the case squarely within the rules announced by this court in the Oak Worsted Mills case, No. J—180, decided December 2, 1929, and the Gotham Can Co. case, No. J—255, decided January 20, 1930. Following the rules laid down in these cases, it is ordered that plaintiff's petition be dismissed.

Williams, Judge; Littleton, Judge; Graham, Judge; and Booth, Chief Justice, concur.

[fols. 20 & 21] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 30th day of April, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

By the Court.

[fol. 22] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,245. Court of Claims. Term No. 323. Second National Bank of Saginaw, Saginaw, Michigan, Trustee of the Estate of Wellington R. Burt, Deceased, Petitioner, vs. The United States. Petition for a writ of certiorari and exhibt thereto. Filed July 29, 1930. File No. 35,245.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is advanced and assigned for hearing immediately following case No. 105, Taft Woolen Co. vs. The United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(55)

FILE COPY

DEC 8 1930
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 323

SECOND NATIONAL BANK OF SAGINAW,
Saginaw, Michigan, Trustee of the Estate of
Wellington R. Burt, Deceased,

Petitioner,

V.

THE UNITED STATES,

Respondent.

On Writ of Certiorari to the Court of Claims

BRIEF FOR THE PETITIONER

W. A. [illegible]
JOSEPH [illegible]
Counsel for [illegible]
Atlanta, [illegible]

OF COUNSEL:

[illegible]
[illegible]
[illegible]

[illegible]
[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 323

SECOND NATIONAL BANK OF SAGINAW, Saginaw, Michigan, Trustee of the Estate of Wellington R. Burt, Deceased,

Petitioner,

V.

THE UNITED STATES,

Respondent.

On Writ of Certiorari to the Court of Claims

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Claims is reported in 40 F. (2d) 129.

JURISDICTION

The judgment of the Court of Claims was entered April 30, 1930 (R. 14). Petition for writ of certiorari was filed July 29, 1930, and the writ was granted October 20, 1930 (51 Sup. Ct. 40). The jurisdiction of this Court rests on the Act of February 13, 1925 (43 Stat. at L. 939, Chap. 229, Sec. 3; 28 U. S. C. Sec. 288).

STATEMENT OF THE CASE

The facts in this case were found by the Court of Claims and appear at pages 11 to 13 of the record.

These findings show that after the statute of limitations had run against the respondent's right to collect an income and profits tax from the Petitioner, the Collector (Commissioner) of Internal Revenue served a notice and demand on it to pay additional taxes in the amount of $27,531.16, together with interest in the sum of $4,198.50, totaling $31,729.66. The Petitioner, under protest, paid to the Collector of Internal Revenue the said sum of $31,729.66 on October 12, 1923.

The pertinent dates are as follows (R. 11-13):

Petitioner is a corporation and executor and trustee of the Estate of Wellington R. Burt, who died March 2, 1919.

April 1, 1918, Burt's return for 1917 was filed.

January, 1921, additional assessment made.

February 17, 1921, claim in abatement filed.

November 23, 1922, part payment made by credit of overpayment of taxes for 1920.

April 1, 1923, expiration of five-year period for collection of tax.

May 24, 1923, claim in abatement rejected.

October 2, 1923, notice and demand for payment of tax made.

October 12, 1923, tax paid by Petitioner under protest.

July 11, 1927, claim for refund filed.

September 1, 1928, claim for refund rejected.

February 4, 1929, suit commenced (R. 6).

Court of Claims entered judgment for the respondent on April 30, 1930, in opinion reported in 40 F. (2d) 129, holding that Section 611 of the Revenue Act of 1928 barred recovery in this case.

From the above it appears that on April 1, 1923, the right of the respondent to collect any additional tax for 1917 from the Petitioner became barred by the statute of limitations under the decisions of this Court in *Bowers v. New York & Albany Lighterage Company*, 273 U. S. 346 (Feb. 21, 1927), and *Russell v. United States*, 278 U. S. 181 (Jan. 2, 1929).

In connection with the claim in abatement filed by Petitioner on February 17, 1921, the Court of Claims found (R. 13):

> "Upon receipt of a claim in abatement it was the common practice to hold up the collection of an additional assessment. The Collector of Internal Revenue *acted in accordance with this practice and in the exercise of his discretion* actually held up the collection of the additional assessment and forwarded the said claim to the Commissioner of Internal Revenue in due course. The collector made no further endeavor to collect the amount covered by the claim in abatement in this case until after the claim had been finally adjusted by the Commissioner of Internal Revenue." (Italics ours).

The respondent relies in defense upon Sections 611 and 607 of the Revenue Act of 1928.

STATUTES INVOLVED

The statutes involved are Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266), and Sections 607 and 611 of the Revenue Act of 1928, which were enacted May 29, 1928 (45 Stat. 791, 874, 875); and we refer at length also to Section 1106(a) of the Revenue Act of 1926 (44 Stat. 9, 113). The material portions of these statutes follow:

Revenue Act of 1921:

> "Sec. 250(d). The amount of income, excess profits, or war profits taxes due under any return made under . . . prior income, excess profits, or war profits tax acts . . . shall be determined and assessed within five years after the return was filed . . . and no suit or proceeding for the

collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax acts . . . shall be begun, after the expiration of five years after the date when such return was filed . . ."

Revenue Act of 1928:

"Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Revenue Act of 1926:

"Sec. 1106(a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. . . ."

QUESTIONS PRESENTED

The questions presented are whether Sections 611 and 607 of the Revenue Act of 1928 attempt to prevent the recovery by suit of taxes paid at the times and under the circumstances above set forth, and whether if so construed

they do not violate the Fifth Amendment to the Federal Constitution.

SPECIFICATION OF ERRORS

1. The court below erred in not construing Section 611 as barring administrative credits and refunds only and as having nothing to do with suits in court.

2. The court below erred in not holding that, if Section 611 is construed as barring all recovery by suit as well as by administrative credit or refund, it is in violation of the Fifth Amendment.

3. The court below erred in holding that Section 611 applies to a case where there has been merely a *delay* in collection and not a legal *stay* of collection.

4. The court below erred in not holding that Section 611 has no application to the present case because it does not appear that collection was even delayed *by* the claim in abatement.

5. If the decision of the court below is to be construed as holding that Section 611 is a withdrawal by the United States of consent to be sued previously conferred by Section 145 of the Judicial Code, and Section 3226 of the Revised Statutes, it is in error in this regard.

6. The court below erred in holding that Section 611 applies to payments under protest and not simply to voluntary payments. (This matter is sufficiently covered in the brief for Petitioners in *Graham v. Goodcell*, No. 36, and will not be discussed in this brief).

7. The court below erred in dismissing the petition.

SUMMARY OF ARGUMENT

The Argument of the Petitioner in this case will be developed under four main propositions, the sustaining of either one of which will be sufficient to establish Petition-

er's right to recover. The propositions are entirely independent of each other, and the failure of the Petitioner to sustain either one of the propositions will in no way affect Petitioner's position in connection with either of the other propositions.

I. ON A PROPER CONSTRUCTION SECTION 611 MERELY LIMITS THE ADMINISTRATIVE POWER TO CREDIT OR REFUND AND DOES NOT PROHIBIT SUIT.

II. THE WORD "STAYED" IN SECTION 611 IS NOT SYNONYMOUS WITH "DELAYED" BUT MEANS "LEGALLY DELAYED."

III. IF SECTION 611 IS CONSTRUED AS AN ATTEMPT TO BAR RECOVERY BY SUIT AS WELL AS REFUND AND CREDIT BY ADMINISTRATIVE ACTION, IT DOES NOT ATTEMPT TO LEGALIZE AND RATIFY THE COLLECTION OF THE TAX OR RATIFY OR LEGALIZE OR RECREATE THE TAX LIABILITY, BUT ONLY PURPORTS TO PROHIBIT RECOVERY OF AMOUNTS ILLEGALLY COLLECTED, AND AS THUS CONSTRUED THE SECTION IS CLEARLY UNCONSTITUTIONAL.

IV. EVEN IF SECTION 611 BE INTERPRETED AS ATTEMPTING TO LEGALIZE AND RATIFY THE ACTION OF THE COLLECTOR IN COLLECTING THE TAXES AND/OR TO REIMPOSE OR LEGALIZE THE TAXES THUS COLLECTED, IT IS CLEARLY UNCONSTITUTIONAL.

INTRODUCTION

The construction of Section 611 should not be approached without a thorough appreciation of the very radical provisions which it contains, if construed as the Government contends it should be. The legislation will be discussed from this standpoint under the Headings III and IV of the

Argument, in which the unconstitutionality of the section as thus construed is urged.

However, entirely aside from unconstitutionality, it must not be lightly presumed that Congress has intended to destroy all right of action for taxes collected after all liability for same had gone, or after the bar of the statute of limitations had fallen, unless it appears in clear and unmistakable terms that it has done so. This is especially true when the facts in a case like the present are considered. The tax was imposed for the year 1917. The statute of limitations expired on April 1, 1923, five years after the filing of the return. The tax was collected more than six months later, and a full and complete right of action to recover it then vested in the taxpayer. The Revenue Act of 1928 was not passed until May 29, 1928, and during all of the time from October 12, 1923, to May 29, 1928, a full and complete right of action existed in the plaintiff to recover the amount sought to be recovered in this suit.

In order for the Court to hold that Congress had any such intention, it is respectfully submitted that that intention must appear in clear words from which there can be no escape, and that no committee reports to show the intention which some of the parties proposing this act may have had in mind can be considered for the purpose of giving to the words used a meaning broader than they would normally have when considered in connection with similar words used elsewhere in the Revenue Acts. In connection with the contention that little weight is to be given to the committee reports (if they are considered at all), if they go in the least beyond the clear words used in the Act, it should be borne in mind that there was a severe conflict in Congress in connection with this section, and that it was inserted against the wishes of the Senate, and only by way of compromise, after radical amendment, and that the members of the House of Representatives, in framing the section, probably phrased it as strongly as they felt they could phrase it and not have it rejected.

In connection with the constitutional arguments under the Headings III and IV of our Argument it is urged that the Court keep before it the argument developed in the Appendix 1 to this brief in support of the contention that the expiration of a statute of limitations on collection of internal revenue taxes not only bars the remedy but extinguishes the liability. This argument has already been developed at length in other briefs filed in companion cases, and we are confident that this Court will recognize its strength. The question of the effect on the constitutional arguments of the possible rejection of the argument on the extinguishment of liability is also discussed in Appendix 1, toward the end.

ARGUMENT

I.

ON A PROPER CONSTRUCTION SECTION 611 MERELY LIMITS THE ADMINISTRATIVE POWER TO CREDIT OR REFUND AND DOES NOT PROHIBIT SUIT

Section 607 provides that a payment after the expiration of the statute of limitations "shall be considered an overpayment and shall be credited or refunded to the taxpayer." Section 611 provides that under certain circumstances a payment after the expiration of the statute of limitations "shall not be considered an overpayment under the provisions of Section 607" and we may assume for the present that Section 611 provides impliedly, as the Government contends, that such payments "shall not be credited or refunded."

It is necessary therefore to find the meaning of "credit and refund" in the Revenue Acts and also the meaning of "overpayment," and to find what is the effect of a prohibition of "credit or refund." The interpretation of Section 611 will then be obvious.

When the tax in this case was collected over the protest of the Petitioner, the statute of limitations had expired and a right immediately vested in the Petitioner to bring suit against the collector or the United States, as it might choose, and to recover the taxes thus wrongfully collected.

Bowers, v. New York & Albany Lighterage Company, 273 U. S. 346 (Feb. 21, 1927);

Toxaway Mills v. United States, 61 Ct. Cl. 363 (Dec. 7, 1925). Reversed by the United States Supreme Court on confession of error by the Solicitor General. 273 U. S. 781 (March 14, 1927). Final judgment rendered 63 Ct. Cl. 646 (June 6, 1927).

This right was recognized and circumscribed by Section 3226 of the Revised Statutes which has been reenacted and amended in the various Revenue Acts. That section provides:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been *erroneously or illegally assessed or collected*, or of any penalty claimed to have been *collected without authority* or of any sum alleged to have been *excessive* or in *any manner wrongfully collected* until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue. . . ." (Italics ours). (26 U. S. C. Sec. 156).

Section 3220 of the Revised Statutes was also amended by the various Revenue Acts. That section provides:

"Sec. 3220. The Commissioner of Internal Revenue, . . . is authorized to remit, refund, and pay back all *taxes erroneously or illegally assessed or collected*, all *penalties collected without authority*, and all *taxes* that appear to be *unjustly assessed* or *excessive in amount*, or *in any manner wrongfully collected*. . . ." (Italics ours). (26 U. S. C. Sec. 149, as amended by Act of Congress May 29, 1928, Ch. 901, Sec. 3, 45 Stat. 996).

It will be noted that Section 3226 does not speak of suits for the "refund or credit" of taxes, but speaks only of suit "for the recovery of any internal-revenue tax."

It will also be noted that neither of these sections confines itself to overpayment, and in fact the word "overpayment" is not mentioned in either of the sections. It is true that "taxes excessive in amount" are referred to, but this is only one of the different grounds upon which taxes may be recovered under these sections which refer first of all to "taxes erroneously or illegally assessed or collected."

Then on February 27, 1926, Congress enacted the Revenue Act of 1926, Section 1106(a) of which provided in part:

> "Sec. 1106(a). The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; *but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. . . .*" (Italics ours),

That section contains every word which it is necessary to construe in interpreting Sections 607 and 611. It contains the words "credit or refund" which it prohibits under certain circumstances. It also contains the word "overpayment" ("overpaid the tax"). This section was repealed by Section 612 of the Revenue Act of 1928 and was replaced by Sections 607 to 611, inclusive, of the Revenue Act of 1928. These sections are therefore, in a peculiar sense, in *pari materia*, and the interpretation of Sections 607 and 611 of the Revenue Act of 1928 is simplified by a comparison with Section 1106(a) of the Revenue Act of 1926 and the construction which that section had received prior to the enactment of Sections 607 and 611.

The express prohibition of Section 1106(a) against "credit or refund" where there had not been an actual "overpayment," had been interpreted by the courts as not barring recovery by suit on the basis of the statute of limitations alone in the following cases:

> *Thornhill Wagon Company v. Noel*, 17 F. (2d) 407 E. D. Va. 1926);
>
> *Ellay Company v. Bowers*, 25 F. (2d) 637 (C. C. A. 2d, April 9, 1928) (cer. den. 277 U. S. 606);

Gove v. Nichols, 23 F. (2d) 856 (D. Mass., Jan. 19, 1928).

The only court which had held to the contrary and considered 1106(a) as a bar to recovery by suit was the Court of Claims in the case of *Adelaide F. Chapman v. United States*, 63 Ct. Cl. 424 (Feb. 14, 1927), which court seems to have continued to labor under the same erroneous impression as to the law which accounts for its decision in the case of *Toxaway Mills v. United States*, supra, later reversed on confession of error in this Court. On petition by the taxpayer to this Court for certiorari in the *Chapman* case the Solicitor General joined with the taxpayer in opposing this construction of Section 1106(a). The only reasonable interpretation of the section seems to be that it prohibited administrative refund of collections made after the statute, but that it had no effect whatever upon suit.

The words "credit or refund" generally are confined in their meaning in the Revenue Acts to credits and refunds by administrative action, and have not been used to refer to recovery by suit. It is certainly true that in general the word "credit" contemplates and refers to administrative action.

It will be noted that when Congress has intended to prohibit recovery by suit it has not confined itself to a prohibition of "credit or refund," but has expressly prohibited "recovery by suit." For example, in Section 284(d) of the Revenue Act of 1926 (44 Stat. 9, 67), Congress provided that where the taxpayer had been given the right to appeal to the Board of Tax Appeals and had filed an appeal within the time prescribed:

> ". . . No *credit or refund* . . . shall be allowed or made and *no suit* . . . for the recovery of any part of such tax shall be instituted in any court . . ." (Italics ours).

Similar language appears in Section 319(a) of the Revenue Act of 1926 and Section 322(c) of the Revenue Act of 1928.

We have observed above that the Revised Statutes dealing with suit and claims for refund, which afford the basis of suit, have referred to "excessive" payments (the only words in those sections approaching "overpayments"), but have referred to "excessive" payments as only one of the classes of payments which may be recovered by suit. Section 1106(a) seems to show conclusively that "overpayment" is not synonymous with "taxes erroneously or illegally assessed or collected," and that there are erroneous and illegal assessments and collections which do not come within the meaning of overpayment as understood by Congress in the Revenue Acts. Section 1106(a) provides:

> "But no credit or refund in respect of such tax shall be allowed *unless* the taxpayer has *overpaid the tax.*"

If the word *"overpayment"* were synonymous with *"taxes erroneously or illegally assessed or collected,"* the portion of Section 1106(a) just quoted would be entirely useless and meaningless, because any payment after the statute would upon that assumption necessarily constitute an "overpayment." The word "overpayment" seems to refer, in Section 1106(a) at least, to payments in excess of the amounts due upon a proper computation, regardless of any legal bar to collection. *It is certainly not synonymous with taxes "illegally or erroneously assessed or collected."*

While the latter words are generally used in the Revised Statutes with reference to recovery of taxes by suit, the word *"overpayment"* has been generally employed in the administrative sections contained in the body of the Revenue Acts beginning with the Revenue Act of 1924. The sections providing for *"credit and refund"* and using the word *"overpayment"* are Sections 272 and 281 of the Revenue Act of 1924, Sections 272 and 284 of the Revenue Act of 1926, and Section 322 of the Revenue Act of 1928; and the words *"tax . . . paid in excess of that properly due"* are used in similar sections in the earlier acts, Section 252 of the Revenue Act of 1921 and Section 252 of the Revenue Act of 1918.

That these sections of the statutes, in which the words "credit and refund" and the word "overpayment" are used, relate only to the authority of the Commissioner and have no effect upon the right of the taxpayer to sue the Collector is borne out by the case of *Fox v. Edwards*, 287 Fed. 669 (C. C. A. 2d, 1923). See also *Coffey v. Exchange Bank*, 296 Fed. 807 (C. C. A. 8th, 1924).

The distinction is clearly set forth in Article 1301 of Regulations 69 under the Revenue Act of 1926:

> "Authority for the credit and refund of any overpayment of any income . . . tax . . . is contained in Section 284. General authority for the remitting or refunding of taxes erroneously or illegally assessed or collected is found in Section 3220 of the Revised Statutes . . ."

After thus noting the interpretation of similar language used in the earlier statutes, and in the very section which is replaced by Section 607 and the following sections of the Revenue Act of 1928, a consideration of Section 607 and Section 611 makes it clear that the language used is not broad enough to bar recovery by suit, although a claim in abatement had been filed, and assuming the collection of the tax was stayed thereby.

Section 607 of the Revenue Act of 1928 provides:

> "Any tax . . . assessed or paid . . . after the expiration of the period of limitation . . . *shall be considered an overpayment and shall be credited or refunded* to the taxpayer . . . " (Italics ours).

The use of the words *"shall be credited or refunded"* and *"overpayment"* indicates very clearly that Section 607 is purely an administrative section and has nothing whatever to do with suits in court which could have been maintained as well before as after the passage of Section 607. The language used clearly shows that Section 607 was directed to administrative action and was aimed to provide for what 1106(a) of the Revenue Act of 1926 had been construed to forbid, that is administrative credit or refund.

The use in Section 607 of the words *"shall be considered* an overpayment" is significant. The fact that it is stated that any such payment shall be *"considered"* an "overpayment" makes it apparent that Congress recognized that it was not previously an "overpayment" and now wished to make it so. If Section 1106(a) had not prohibited administrative refunds of taxes untimely collected "unless the taxpayer has *overpaid* the tax," it is most unlikely that Section 607 would have contained any provision whatever with reference to overpayments. The section would probably have provided only that the tax "shall be credited or refunded to the taxpayer." In other words, the declaration that such a payment shall be considered an overpayment seems to be only an incidental part of the plan of making such payment subject to administrative refund. 1106(a) had provided it should not be so subject unless overpaid. Section 607 therefore provided it should be *"considered* an overpayment."

As stated above, Section 611 is merely a limitation upon Section 607. Section 611 simply provided that payments made under certain conditions where claim in abatement had been filed "shall not be considered an overpayment under the provisions of Section 607." Certain payments constituting taxes erroneously or illegally assessed or collected or otherwise wrongfully assessed or collected, not previously constituting overpayments, were made overpayments by the provisions of Section 607. Section 611 in effect says that the provisions of Section 607 making overpayments of certain payments not previously overpayments shall not apply to the payments described in Section 611. This certainly cannot be construed to make payments which previously beyond question were *"taxes erroneously or illegally assessed or collected"* or otherwise *"wrongfully collected,"* and therefore recoverable under Section 3226 of the Revised Statutes, into valid and legal payments, and therefore not recoverable.

As stated above, it may be assumed for the purpose of this argument that Section 611 may be construed, as the Government contends, as prohibiting whatever Section 607 allows, and therefore in effect providing that "no credit or refund of any tax covered by Section 611 shall be made to the taxpayer." But with Congress knowing as it clearly did from the consideration of Section 1106(a) without reference to the various other provisions of the Revenue Acts (which tend to confirm the construction arrived at from a consideration of 1106(a) alone), that "credit or refund" was used in the Revenue Acts to relate to administrative action, and that "overpayment" is not synonymous with "taxes erroneously or illegally assessed or collected," it is not to be presumed that if Congress had intended to forbid the recovery by suit of taxes which had admittedly been "erroneously or illegally assessed or collected," it would have contented itself with providing that such taxes should not be "considered an overpayment," much less by providing that they should not be "considered an overpayment under the provisions of" a particular section which conferred no new right to recovery by suit, and in fact made no reference to suit whatever, expressly or impliedly.

In this connection attention is called again to the care which has been taken by Congress to prohibit suit for recovery in court in precise terms as well as to prohibit credits and refunds when it intended to prohibit court action. As illustrative of this, we referred above to Section 284(d) and 319(a) of the Revenue Act of 1926, and Section 322(c) of the Revenue Act of 1928.

It should also be observed that in Section 606 of the Revenue Act of 1928, the section immediately preceding Section 607, Congress has in express terms prohibited court action where it has been its purpose to do so. It provides:

> "Sec. 606(b) . . . (1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and (2) in any suit, action or proceeding, such agreement,

or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

The provisions of Section 1106(b) of the Revenue Act of 1926 are substantially the same. Those provisions appear in another subsection of the same section in which appear the provisions of Section 1106(a), discussed above.

The construction for which we have contended above, and which we submit to be the reasonable construction of this statute, would be sound even if the statute did not relate to taxes, and if it were not retroactive. The fact that it does relate to taxes requires it to be liberally construed in favor of the taxpayer and against the Government. This is especially true when it is considered that the statute is retroactive. If Section 611 is construed to bar all recovery by suit, as well as by administrative refund, as the Government contends it should be, it is very clearly unconstitutional. To say the least, the gravest doubts as to its constitutionality would be raised, and it is clear from the decisions of this Court that where a construction will make the constitutionality of a statute even doubtful, and another reasonable construction can be given it, it will be so construed as to avoid the constitutional doubt.

Missouri Pacific R. Co. v. Boone, 270 U. S. 466 (1926);

Linder v. United States, 268 U. S. 5 (1925).

Waiving for a moment the question of constitutionality, we respectfully submit that the result of construing the statute as the Government contends it should be construed, is so shocking to one's sense of fairness that any plausible construction of the Act which would avoid these results should be adopted.

FALLACY OF ARGUMENTS IN OPINION IN REEVES V. ANDERSON AGAINST CONSTRUCTION FOR WHICH WE CONTEND. We feel that the argument in this brief answers the argu-

ments of Judge Hand in the case of *Reeves v. Anderson*, 43 F. (2d) 679 (C. C. A. 2d, July 21, 1930), but two of his arguments we specifically mention. He states that the construction which we here urge limiting Section 607 to administrative refunds is unreasonable because:

(1) Section 3226 of the Revised Statutes requires the filing of a claim for refund as a condition precedent to suit, and it would be an unusual thing to require as a condition precedent to suit the filing of a claim, the granting of which is prohibited;

(2) It is difficult to conjure any reason which Congress could have had for obliterating the more commodious way of settling such controversies (i. e. by administrative refunds), and still exposing the treasury to actions at law which would result in exactly the same thing.

There are any number of answers to the first argument. The first one which would occur to anyone is that Congress simply overlooked the amendment of a general section such as 3226 to fit a particular case such as this. On the other hand, there would be a very good reason for not amending that section so as to eliminate the necessity for a claim for refund. The matter of the time limit on suits for refund may be extended for a number of years by the filing and pendency of a claim for refund. The filing of the claim puts the Government on notice that suit may be contemplated and tends to preserve whatever evidence is necessary. It would have been unreasonable to extend the time for the filing of a claim for refund and force the taxpayer to sue much earlier than he might otherwise have to sue, and it would also be unreasonable to extend the time for filing suit for nearly as long as it might be extended by a claim for refund. The drawing of amendatory provisions would have involved considerable difficulty and would undoubtedly have done more harm than good. The filing of a claim for refund, although the Commissioner may be forced by law

to reject it in the particular case, causes no real trouble to anyone.

One is reminded of the answer given by Mr. Justice Brandeis to an argument which was made by counsel in the case of *Florsheim Bros. Dry Goods Co. v. United States*, 280 U. S. 453, 466 (1930):

> "It is also urged that unless a contract was intended (in the execution of a waiver), there is no reason why the consent of the Commissioner should have been required. But an otherwise plain meaning should not be distorted merely for the sake of finding a purpose for this administrative requirement."

The second argument is sufficiently answered by calling attention to the great jealousy which has been shown in Congress in connection with refunds by the Commissioner. In this connection, attention is called to the provisions of Section 710 of the Revenue Act of 1928, which provides that no refund or credit in excess of $75,000.00 shall be made until a report of it has been filed for thirty days with a joint committee on internal revenue taxation. This provision has never been construed by the committee to relate to payments made pursuant to court judgments and the Department and the Comptroller General have construed it as not applying to such payments.

Indeed, there is agitation at present for a Congressional investigation to establish rules for court adjudication of tax refunds generally. V. U. S. Daily 2654:1, October 30, 1930. Representative Garner of Texas, minority leader of the House and ranking member of the Ways and Means Committee, urges such action, as reported in the periodical cited. At least it is not inconceivable to have legislation prohibiting administrative refunds in cases where judgment may be had in court.

There was perhaps a sounder reason, however, in the present case for taking the situations covered by Section 611 out of the provisions of Section 607 directing admin-

istrative refunds. Many claims in abatement were filed with bond as was that involved in the case of *United States v. John Barth Co.*, 279 U. S. 370 (1929), and in many others money had been deposited in escrow as in the case of *Mascot Oil Company v. United States*, 42 F. (2d) 309 (Ct. Cl. 1930), now pending in this Court on certiorari. There were many legal questions with reference to the effect of claims in abatement and the other facts accompanying claims in abatement, which were not clear, and it was perfectly reasonable for Congress to leave these matters to be determined by the courts and to remove them beyond the administrative power of the Commissioner. The questions involved being purely legal, the trial of such cases in court involves no such accounting difficulty as is involved in the determination of the amount of tax due on the merits.

But the clearest answer to all such arguments is made by Mr. Justice Sutherland in the case of *Noah Crooks, Collector, v. Benjamin Harrelson* (October Term 1930, No. 24), decided by this Court on November 24, 1930, where he reiterates the principle thoroughly established by the decisions of this Court, that when Congress has used plain terms, the literal meaning of which is clear, the Court is not to modify that meaning, even to avoid what may seem to the Court unreasonable results; and that this adherence to the letter of the statute applies with peculiar strictness to taxing acts.

II.

THE WORD "STAYED" IN SECTION 611 IS NOT SYNONYMOUS WITH "DELAYED" BUT MEANS "LEGALLY DELAYED"

One of the conditions necessary to the operation of Section 611 is that the collection of the tax must have been *"stayed"* by the filing of the claim in abatement. The Government contends that *"stayed"* in this connection means merely *"delayed."* We maintain that it means *"legally forbidden"* or *"legally prohibited."*

"Stayed" may be synonymous with "delayed" in many situations; but when it is used in the sense of affecting the action of an officer of the Government in the performance of the duties of his office, it means "legally delayed." This construction is clear without any reference to committee reports or other legislative history. And this is especially true when the rule of liberal construction in favor of the taxpayer is considered. We are also confirmed in this construction by the use of the word "stay" in other sections of the Revenue Acts (Sections 273(f) (g) and (h) of the Revenue Act of 1928 and 279(f) (g) and (h) of the Revenue Act of 1926 and 603 of the Revenue Act of 1928), where it clearly refers to a "legal stay."

It is admittedly true that a claim in abatement did not generally work any "legal delay" of collection. But there was one class of cases where it did effect a "legal delay." That is in the cases covered by Section 234(a) (14) of the Revenue Act of 1918, which provides as follows:

> "Sec. 234(a) (14). At the time of filing return for the taxable year 1918, a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. *In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided,* but *the taxpayer shall accompany his claim with a bond* in double the amount of the tax covered by the claim, *with sureties satisfactory to the Commissioner,* conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed, then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed . . . " (Italics ours).

The interpretation of the word "stay" as meaning "legal delay" does not therefore make it meaningless.

The Government then replies that Section 611 covers cases where the claim in abatement is filed *"with or without bond,"* and contends that there could be no "legal stay" under Section 234(a) (14) where no bond was given, and that therefore the words *"without bond"* would be meaningless if "stay" is interpreted as *"legal delay."* This argument places a construction upon 234(a) (14) which the language of the section does not necessarily require. It is no doubt contemplated by that section that a bond will generally be filed where a stay is sought. But the provision with reference to a bond is so placed and so worded that it could certainly be argued with great reason that it is not mandatory but directory, and that the Commissioner may waive the requirement if he sees fit to do so. If he did waive the requirement, either by accepting a deposit of cash or because for some other reason he was confident of being able to collect without a bond and notified the taxpayer that he was waiving that requirement, it could be argued with great force that the collection of the tax would be stayed just as if a bond had been given. It would certainly have been reasonable for Congress to have recognized such a possibility in providing for cases where "legal delay" of collection was effected by claim in abatement.

Even if there is no case where there could have been a "legal stay" without a bond, the word "stay" should not for that reason alone be construed to mean a mere "voluntary delay." The rule which requires that every part of an Act should be given some reasonable meaning should not prevail over the rule that words are to be taken in their usual and ordinary sense in the connection in which they are employed and in the same sense in which they are used elsewhere in the same Act. A different rule might apply if the provisions of Section 611, if construed to refer only to a legal stay, were in direct conflict with other provisions of

the Revenue Acts. This, however, is not the situation. Section 611 is made to apply only where (1) claim in abatement is filed with or without bond, and also (2) collection is stayed. The fact (if it be a fact), that there can be no "stay" without a bond does not make any provision of Section 611 conflict with any other. At most it simply shows that Congress may have been laboring under a misapprehension as to the effect of filing a claim in abatement without bond.

The fact that a limitation of this section to the cases where collection was "legally delayed" may cause the section to operate less broadly than Congress may have anticipated does not warrant placing upon the words used other than their ordinary meaning. It was strikingly held by this Court in the case of *Fullerton-Krueger Lumber Co. v. Northern Pacific Ry. Co.*, 266 U. S. 435 (1925), that the fact that the "evil" to be remedied is clearly very much broader than the language of the remedial Act does not authorize the court to construe that Act retroactively when the intention that it should be retroactive is not clearly expressed. See 38 *Harv. L. Rev.* 836.

The court should not construe "stay" here as meaning mere "delay" where the intention is not clearly expressed. It is not nearly so unreasonable to provide that a "legal delay" should take a case out of the operation of the statute of limitations as it is to provide that mere "voluntary delay" should do so. It is probable that the "stay" provided for by Section 234(a) (14) of the Revenue Act of 1918 would have automatically suspended the running of the statute of limitations. Certainly in a situation of that kind the provisions of Section 611, especially if construed to bar all recovery, would be much more reasonable than in cases where there has been mere voluntary forbearance by collectors in their own discretion.

In that connection it should be borne in mind that Congress is made up largely of lawyers. *It is not at all certain*

that Section 611 *could have been enacted at all if it had used the word "delayed" instead of "stayed."* A lawyer would naturally understand the fairness of some such provision as this where collection had been "stayed" or "legally delayed" while he would not be inclined to agree to any such provision based upon mere voluntary delay in collecting. It should be borne in mind that the Senate was hostile to the section even in the form in which it was passed, and that it went in under a compromise arranged with the House of Representatives. In this connection the language of the court in *Lincoln v. United States*, 202 U. S. 484, 498 (1906), is most appropriate.

> "It should also be remembered that there was a powerful opposition in Congress and that the phraseology of the act probably represents all that it was deemed safe to ask. Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words."

Lastly, it is submitted that *there should not be lightly attributed to Congress an intention to make the matter of reopening the statute of limitations in connection with taxes long barred dependent upon the oral testimony of collectors* as to whether a voluntary and discretionary indulgence was brought about by a claim in abatement or by some other of the reasons which may have caused delay in various cases, such as inability to find property of the taxpayer, the voluntary withholding by the collector, regardless of the filing of the claim in abatement, to avoid financial embarrassment in cases where it was felt that the collection of the tax was not being endangered, etc.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *United States v. Burden, Smith & Co.*, 33 F. (2d) 229 (1929), has reached the correct result on this question and the opinion, though brief, is sound. The court there said:

> "Taxing statutes are to be interpreted liberally in favor of the taxpayer. Words of the statute are to be given their

plain meaning. 'Stayed,' in a legal sense, is not interchangeable with 'delayed.' It connotes some act on the part of the taxpayer which would morally or legally tie the hands of the Commissioner and prevent collection of the tax. The mere filing of a claim for abatement without more could not possibly have that effect."

III.

IF SECTION 611 IS CONSTRUED AS AN ATTEMPT TO BAR RECOVERY BY SUIT AS WELL AS REFUND AND CREDIT BY ADMINISTRATIVE ACTION, IT DOES NOT ATTEMPT TO LEGALIZE AND RATIFY THE COLLECTION OF THE TAX OR RATIFY OR LEGALIZE OR RECREATE THE TAX LIABILITY, BUT ONLY PURPORTS TO PROHIBIT RECOVERY OF AMOUNTS ILLEGALLY COLLECTED, AND AS THUS CONSTRUED THE SECTION IS CLEARLY UNCONSTITUTIONAL

Assuming that the court disagrees with the contention under Headings I and II of our Argument, holding that "stay" is synonymous with "delay," and holding that Section 611 attempts to bar recovery by suit as well as by administrative refund, we contend that the section is unconstitutional.

We contend under Heading IV of our Argument, pages 32 to 50, that even if Section 611 is construed to reimpose or to ratify and legalize the barred tax and/or the act of the collector in collecting same, it is unconstitutional.

Under this Heading (III) we maintain that it is plain that the section does not attempt to reimpose an extinguished liability and/or to legalize or ratify the action of the collector in collecting same, but that it is at most a prohibition against recovery by the taxpayer. The unconstitutionality of Section 611 as thus construed is beyond dispute.

In order that there may be no confusion whatever, let us state that, for the sake of this argument under Heading III, we are conceding that the contentions made under Headings I and II, supra, will not meet the approval of the Court, and we are further assuming that if the Court finds a clear reimposition or ratification and legalization of the barred tax liability and of the act of the collector in collecting same, it will hold that the act is constitutional, contrary to our arguments under Heading IV, infra. With these concessions clear for the sake of the argument under this Heading, we proceed.

(a). Further Construction of Section 611 if Construed to Bar Recovery by Suit.

There are no words of legalization or ratification in Section 611, nor any which indicate that Congress recognized even the possibility that ratification might be necessary. The purpose of the section appears on its face to be *to prohibit refunds*. The section is stating how the payments mentioned shall be considered in the future for the purpose of credits and refunds, and is in effect prohibiting such credits and refunds. It is not legalizing and ratifying the act of the collector in collecting, and most assuredly it is not reimposing or recreating the barred tax liability. It is exempting payments described in Section 611 from the operation of Section 607 which provides for refunds.

Contrast the language used in Section 611 with that used in the statutes involved in the case of *United States v. Heinszen & Co.*, 206 U. S. 370 (1907), and in *Rafferty v. Smith, Bell & Company*, 257 U. S. 226 (1921), where nothing was left to the imagination of the court. The statute involved in the *Heinszen* case (Act of Cong. June 30, 1906, ch. 3912, 34 Stat. 636), provided:

> "That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eight, nineteen hundred and two,

at all ports and places in said islands, upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed."

The language of the act in question in the case of *Rafferty v. Smith, Bell & Company*, supra, was substantially the same.

The Court in the course of its opinion in the *Heinszen* case, supra, remarked (at p. 382): "The text of the act of Congress is unambiguous and manifests as explicitly as can be done the purpose of Congress to ratify." The Court later on proceeds (at pp. 389, 390) to discuss the cases of *De Lima v. Bidwell*, 182 U. S. 1 (1901), and *Lincoln v. United States*, 202 U. S. 484 (1906). The Court considers that the ambiguity of the language was responsible for the decisions in both of the earlier cases, and in that way contrasts those cases with the *Heinszen* case.

Certainly, if Congress had felt that it was necessary to ratify and legalize action previously taken without any real authority whatever, it would have used clear and unambiguous language, from which there could be no escape, to the effect that such action was being ratified and legalized. It is respectfully submitted that the reimposition of a barred liability for taxes, where the right to sue for the wrongful collection of same had already accrued, would require more than ordinarily clear language. If a tax is not to be imposed by inference, as this Court has repeatedly held [*United States v. Merriam*, 263 U. S. 179 (1923); *Crooks v. Harrelson*, supra], certainly a liability for taxes in years long past, which had by statute been long since obliterated, cannot be reimposed nor the collection thereof ratified or legalized except by language more than ordinarily clear and unequivocal.

A consideration of the provisions of Section 611, with reference to taxes paid *"within one year after the passage of this act,"* shows conclusively that the section actually means what it seems on a casual examination to mean. Section 611 provides that when the conditions therein set forth exist

> "Then the payment of such part (made *before* or within *one year after* the passage of this act) shall not be considered an overpayment under the provisions of Section 607." (Italics ours).

The statute puts on the same basis taxes paid within one year after the passage of the Act and those paid before the passage of the Act. Therefore, if Section 611 reimposes any tax liability or ratifies any collection illegal at the time made, it has the same effect to ratify and legalize all taxes collected within one year after the Act as it has to ratify and legalize any taxes collected prior to the passage of the Act. But the Government concedes that it has no such effect as to taxes collected after the passage of the Act. On July 27, 1928, about two months after the passage of the Revenue Act of 1928, the Commissioner of Internal Revenue issued a ruling, Mim. 3660, VII-2 C. B., p. 82, to the effect that "Sections 607 and 611 do not authorize the Bureau *to enforce* collections of a tax *in any case* after the expiration of the period of limitation." The ruling went ahead to state that even voluntary payment should not be accepted from a taxpayer without notifying him of his right to withhold the payment.

It would be little short of absurd to attribute to Congress any intention to revive a liability for taxes which had not been paid and at the same time to provide no remedy whatever for the enforcement of that liability.

As to future payments it seems that there is at most a prohibition only against refunds and not any attempt to legalize or ratify any tax or the collection thereof. *Whatever is true with reference to future payments* we submit *is necessarily to be considered true with reference to past pay-*

ments, because there is absolutely no distinction in the statute between the two.

The constructions for which we have contended under Headings I and II above are clear without reference to committee reports, and we do not feel that the language used by Congress should be stretched beyond its natural meaning by reference to these reports, whatever they may say. Taxes are not to be imposed, and are certainly not to be retroactively modified or reimposed, on the basis of committee reports. If, however, the Court should turn to the committee reports for any purpose, it is respectfully submitted that they clearly show that, however far Congress may have gone in Section 611 in prohibiting recovery by the taxpayer, it sought to do so only by prohibiting the payment of the money back to him and not by legalizing or ratifying the payment as taxes or the action by which they were collected. The last report, that of the Managers for the House, stated to the House after conference (House Report No. 1882, p. 23, 70th Congress, 1st Session):

> "The Senate amendment struck out this section (the subsection of 611 proposing to give the right to collect by distraint or suit within one year after the passage of the 1928 Act) and the House recedes with an amendment retaining the *prohibition upon refunds*, as above described, and eliminating the authority for collection." (Italics ours).

It seems that the provision originally inserted authorizing collection by distraint within one year after the passage of the 1928 Act was stricken out because, as stated by Mr. Garner, ranking Democratic Member of the Ways and Means Committee, "there was some doubt about the constitutionality of it, and (we) decided to keep the $30,000.00 that we had in the Treasury." Cong. Rec., Vol. 69, p. 10136. This would seem to show conclusively that Congress had no idea of legalizing and ratifying collections previously made, but intended only to prohibit refunds; because, if Congress intended the Act to operate by ratification and legalization, it could have operated just as well in

connection with taxes yet to be collected, as in connection with those collected in the past. It seems clear that for some reason Congress had the idea that what the Government had it could keep, regardless of legality, whereas its power to authorize further collections was doubtful. The section in its original form, which provided for collection within one year after the passage of the Act, may have had a different purpose and effect. Language used with reference to the section in its original form may not be applicable to the section in its final form.

(b) Unconstitutionality of Section 611 Construed as Barring Recovery by Suit but not Legalizing or Ratifying Collection.

As stated above, the unconstitutionality of Section 611 is clear beyond question, if it is to be construed as simply barring recovery of amounts illegally collected without legalizing and ratifying the collection. The cases of *United States v. Heinszen* and *Rafferty v. Smith, Bell & Company*, supra, are no authority for any position to the contrary. Those cases go solely on the doctrine of ratification.

This Court has never held that where an exaction is made by a taxing officer of the Government, where no liability whatever for Federal taxes exists, the person from whom the illegal exaction is made can be deprived of his right of action against the individual so acting without some other proper remedy being left open to him.

In the case of *Cary v. Curtis*, 3 How. 236 (1845), it was held that an Act of Congress deprived the taxpayer of his right to sue the Collector of Customs for amounts illegally exacted as for money had and received, but it did not hold that taxpayer was deprived of all remedy or that he could be constitutionally deprived of all remedy. The Court said:

> "(The act) has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid." (at p. 242).

The court said further:

> "The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due." (at p. 250).

It is true that in one of the dissenting opinions it is pointed out that these remedies did not exist, but at least the Court in denying the right to sue the collector was assuming that the remedies did exist. And Mr. Justice Story and Mr. Justice McLean in their dissenting opinions both recognized the existence of an administrative remedy.

The case of *Collector v. Hubbard*, 12 Wall. 1 (1870) is authority for the proposition only that conditions such as the requirement of filing claim for refund can be imposed after a right to sue had vested.

It is also true, as held in *Cheatham v. United States*, 92 U. S. 85 (1875), that reasonable limitations of time and requirement of appeal from the Commissioner's decision prior to suit may be imposed upon the right to sue.

On the other hand, it has never been held by this Court, and we respectfully submit that it ought never to be held by this Court, that a taxpayer can be deprived of all remedy, judicial and administrative, in connection with illegal assessments and collections of taxes.

The attitude of this Court in matters of this sort is clearly shown by the opinion in the case of *Graham v. DuPont*, 262 U. S. 234 (May 21, 1923). The Court denied an injunction against collection and held that there was a full system of corrective justice provided after payment. No one can read that opinion and presume that the Court would have reached the same conclusion had there been no opportunity for a reasonable hearing after the collection of the tax. See also *Wickwire v. Reinecke*, 275 U. S. 101 (1927).

The Court will no doubt be referred to cases holding that the United States can withdraw the right to sue it. About that there can be no question. That rests on the immunity of a sovereign from suit. The same immunity does not extend to officers of the Government. See Laski, *"Responsibility of the State in England,"* 32 Harv. L. Rev. 447.

In this connection it may be well to note that even in the absence of statute the right to sue a collector for erroneous collection existed. *Elliott v. Swartwout,* 10 Pet. 137 (1856).

Even if it should be conceded that as to future collections Congress might have the power, without substituting any other remedy, to deny to the injured parties the right to sue collectors (such as has in the past arisen when any illegal collection has been made), that concession still would not go far enough to support the contention that Congress may take away the right to sue a collector which arose under a valid statute in force when the wrong was committed. That right is a vested right like any other right of action vested in one individual against another, and the fact, if it should be conceded to be a fact, that Congress might in the first instance have made the officer immune from suit on account of his wrong, would not authorize the destruction of the right of action after it has vested. The *Heinszen and Rafferty* cases are, as stated above, no authority for any such proposition, because in those cases there was no taking away of a right to sue for any wrong committed, but the creation of a right where there had previously been a wrong, which creation Congress had a right to make under the circumstances. The right of action vested subject to the power of the United States to ratify, and the right of action is destroyed as a mere incident of the ratification.

The right to sue a sovereign can, of course, be taken away after it has vested. That is a necessary incident of sovereignty, and is perhaps superior to all constitutional limi-

tations. But the right to sue an officer for an illegal act done in the name of the Government rests upon an entirely different basis.

Therefore, if Section 611 is construed as simply barring recovery and not as legalizing and ratifying the collection of the taxes or legalizing, ratifying and reimposing the barred liability, there is no possibility of this Court holding that it was within the constitutional power of Congress to enact it.

(c) Section 611 does not Withdraw the Consent of the United States to be Sued if Right to Sue Collector Remains.

We do not question the power or right of the United States to withdraw its consent to be sued if it wishes to do so. On the other hand, if the United States cannot abolish the taxpayer's right to sue the collector without placing some other remedy in its place, there is not the slightest reason for supposing that Congress intended to withdraw the right to sue the United States. If remedy by suit against the collector entitling the taxpayer to a jury trial is left undisturbed, certainly Congress could not have intended to withdraw the right to sue the United States given by Section 145 of the Judicial Code (28 U. S. C., sec. 250) and Section 3226 of the Revised Statutes. The provisions of Section 611 cannot fairly be construed as being separable to this extent.

IV.

EVEN IF SECTION 611 BE INTERPRETED AS ATTEMPTING TO LEGALIZE AND RATIFY THE ACTION OF THE COLLECTOR IN COLLECTING THE TAXES AND/OR TO REIMPOSE OR LEGALIZE THE TAXES THUS COLLECTED, IT IS UNCONSTITUTIONAL

It has been argued under Heading III above that as a matter of statutory construction Section 611 cannot be held to

provide for the legalization and ratification of collection, but that at most it only bars the right to sue for the recovery of sums illegally collected. Assuming, however, that Section 611 should be construed as attempting specifically to legalize and ratify collections after the statute, and/or to reimpose or legalize the taxes thus collected, the section would nevertheless be unconstitutional and void under the Fifth Amendment in that it would be discriminatory, arbitrary, whimsical, capricious and unjust.

There is now no doubt that taxing acts of Congress may be held void under the Fifth Amendment.

Nichols v. Coolidge, 274 U. S. 531 (1927);

Blodgett v. Holden, 275 U. S. 142 (1927);

Untermyer v. Anderson, 276 U. S. 440 (1928);

Amberg, "Retroactive Excise Taxation," 37 Harv. L. Rev. 691.

(a) Section 611 is Much too Unreasonably Retroactive to be Valid as an Imposition of Taxes de novo.

It is not anticipated that the Government will seriously contend that Congress could in 1928 impose *de novo* taxes for 1917 or 1909. The court has specifically held that the retroactive gift taxes and estate taxes involved in the cases just cited are unconstitutional. While income tax acts have been upheld which are retroactive to the first of the year, or in a few cases where they have been passed after the end of a calendar year and are retroactive to the beginning of that year, no attempt has ever been made to enact legislation of this character and make it retroactive for several years past, and it is not thought that this Court would for a moment entertain the thought that such legislation would be constitutional. For collection of statutes, see footnote by Mr. Justice Brandeis, dissenting opinion *Untermyer v. Anderson*, supra, which is copied as "Appendix 2" to this brief, page 56.

It will be noted that *Section* 611 *applies not only to income taxes, but to all internal revenue taxes.* It applies to estate taxes, to capital stock taxes, sales taxes and all the other various excise taxes imposed by the various Revenue Acts from 1916 through 1921. It applies as well to taxes under the Corporation Excise Tax Act of 1909 (Act of Aug. 5, 1909, Ch. 6, Sec. 38, 36 Stat. 112) and under the Income Tax Act of 1913 (Act of October 3, 1913, 38 Stat. 114, 166, 172) as to taxes under the Revenue Act of 1921 and the preceding acts. Under Section 250(d) of the Revenue Act of 1921 liability for the tax of 1909 ceased to exist in 1915. [Sec. 1320 of the Revenue Act of 1921 provided a limitation on assessments and collection of *any internal revenue tax* not covered by Sec. 250(d)]. Yet if by any chance taxes in that year were not paid but were assessed within time, and there was any delay in collection caused by the filing of a claim in abatement, a collection by distraint, even in April, 1928, would be legal if Section 611 is construed as contemplated by this Heading and held constitutional.

In the case at bar collection was made of a 1917 tax in October, 1923, more than six months after the liability had ceased. Section 611 would be equally applicable, however, if the collection had been made on May 15, 1928, more than five years after the liability had ceased.

It is just as unlikely that the Government will contend that at the time the collections covered by Section 611 were made Congress could have imposed *de novo* the taxes thus collected as it is that it will contend that Congress could have imposed the taxes *de novo* when the 1928 Act was passed on May 25, 1928. It is true that some of the collections covered by Section 611 may have been made only a few days after the statute of limitations had run, but others were made as much as four or five, and some possibly as much as ten years, after the statute of limitations had extinguished the liability, and there is no basis laid down in Section 611 for distinguishing between taxes collected within a few days after the expiration of the statute and those

made several years afterward. And if the statute is constitutional as to those made several years after the statute of limitations had expired, it will undoubtedly be held constitutional as to all.

(b) The Doctrine of the Heinszen and Rafferty Cases does not Sustain Section 611.

If the Government contends that there was an attempt to legalize and ratify the action of the collector it will contend that it is not necessary to show that Congress could have imposed a tax *de novo* and will no doubt rely on the case of *United States v. Heinszen*, supra, and *Rafferty v. Smith, Bell & Company*, supra, which cases when properly analyzed have no bearing upon the issues involved in this case. These cases have been referred to above under Heading III, where it is shown that they cannot apply in any situation where there is no attempt at ratification. It will be shown below that these cases equally fail to sustain the Government's position, even if Section 611 be construed as attempting to legalize and ratify collections made. The *Heinszen* case and the *Rafferty* case are the same in principle, and we shall therefore refer only to the facts of the *Heinszen* case where the reasoning upon which the ratifying act was upheld was more fully developed.

(1) *The Doctrine of Ratification Established in the Heinszen Case is Inapplicable Unless Power to Authorize Existed When Collection was made.*

In the *Heinszen* case there was involved the question of the power of Congress in 1906 to ratify the collection of tariff duties in the Philippine Islands which a Presidential order had imposed, or attempted to impose, after all authority in the executive to make such imposition had ceased and the islands had come under the control of Congress. The collections sought to be ratified were made from 1899 to March 8, 1902, and the ratifying act was not enacted until 1906.

The ratifying act was upheld on the principle of ratification in the law of agency, the Court holding that since Congress could have authorized the collection of the duties if action had been taken at the time the duties were being collected (which it is to be presumed was coincident with the introduction of the imports into the islands), it could, when the collection has been illegally made, ratify the acts done on its behalf by its agents who were previously acting beyond their authority. In other words, the fundamental premise upon which the Court rested its conclusion in that case was that the unauthorized action could have been authorized by Congress at the very time when it was being taken. The Court said (p. 386):

> "The (ratifying) act is but an exercise of the conceded power dependent upon the law of agency to ratify an act done on behalf of the United States which the United States could have originally authorized."

There was no doubt of the power of Congress in the situation there presented to have imposed the duty *de novo* if Congress had acted at the very time when the collection was being made. That power was so clear that the Court simply assumed it without discussion.

Here the question is entirely different. As we have attempted to show under the discussion of "Unreasonable Retroactivity" under (a) above, it is not to be presumed that this court would hold that in the cases covered by Section 611 the taxes could have been legalized or reimposed or that authority to collect same could have been given originally at the time when the collections were being made.

If the Court should hold that such authority could have been given by the action of Congress taken at the time when the collections were being made, then we would readily admit that the *Heinszen* case is authority for the proposition that that collection could be later ratified, and the *Heinszen* case would then sustain the constitutionality of Section 611, except for its unreasonably discriminatory and arbitrary provisions which are discussed below and which we con-

tend would make the section unconstitutional without regard to its unreasonably retroactive effect. But if the Court holds that Congress did not have power to authorize the collections at the time when they were being made, then the *Heinszen* case is no authority whatever in support of the constitutionality of the subsequent ratification by Section 611. The *Heinszen* case does not even touch upon the issues which must determine whether Congress had authority to authorize the collections covered by Section 611 if it had acted at the time the collections were being made, and of course it in no way touches upon the constitutionality of arbitrary and discriminatory provisions such as are contained in Section 611.

(2) *Section* 611 *is Invalid under the Doctrine of the Heinszen Case because the Attempted Ratification Followed Effective Repudiation.*

There is another very clear distinction which makes the doctrine of the *Heinszen* case inapplicable to cases covered by Section 611; that is, the *principle of repudiation* in the law of agency. This Court should hold, as was held by the Supreme Judicial Court of Massachusetts in the case of *Holden v. Metropolitan National Bank,* 151 Mass. 112 (1890), the opinion in which was written by Mr. Justice Holmes, that where one purports to act as agent for another without authority and the unauthorized acts are made known to the principal and the principal repudiates such acts, the principal is not in a position subsequently to ratify those acts. Congress should not therefore be permitted to ratify collections which it has previously repudiated.

There was effective repudiation of the collections here involved. Large numbers of unauthorized collections after the statute of limitations had expired were made in 1923, 1924 and 1925. This was called to the attention of Congress. The Court of Claims had held that such amounts could not be recovered from the Government, *Toxaway Mills v. United States,* supra, holding in effect that the statute operated to

bar the remedy but did not extinguish the right of the Government to collect. When this situation was called to the attention of Congress its answer in Section 1106(a) of the Revenue Act of 1926 was a repudiation of the action of the collectors in collecting after the expiration of the statute of limitations. Section 1106(a) of the Revenue Act of 1926 provides:

> "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability . . . "

The legislative history of this section is discussed in other briefs and is referred to elsewhere in this brief. It shows clearly that Section 1106(a) was enacted expressly to avoid the injustice of the *Toxaway Mills* decision.

The attempt of a later Congress to take advantage of these unauthorized and illegal acts on the part of collectors can have no effect. The intervening repudiation should clearly be held to preclude subsequent ratification.

(3) *Congress must have had Power to Authorize at the Time of Ratification.*

Not only is it necessary that Congress should have had power at the time of the acts of the collectors to authorize such acts, but it is also necessary, for the application of the doctrine of ratification, that Congress at the time of the ratifying statute should have power to give authority for the acts in question.

Forbes Pioneer Boat Line v. Commissioners, 258 U. S. 338 (1922);

Bird et al., Assignees of Carne & Telo v. Brown et al., 4 Exch. 786 (1850);

Marsh v. Fulton County, 10 Wall. 676 (1870);

Mechem, "Agency" (2d ed. 1914) Sec. 385.

Under these authorities it is clear that regardless of whether or not Section 611 amounted to an imposition *de novo* of internal revenue taxes on account of transactions or activities occurring as far back as 1909 or before, a test of the power of Congress in 1928 to ratify the collections in question is to be found in the power of Congress in 1928 to make such an imposition *de novo*. While this test was rejected by Mr. Justice White in the *Heinszen* case, it does not appear that it had been called to his attention that the law of agency contains a well recognized restriction upon the doctrine of ratification, and requires as a condition of ratification, the power and ability on the part of the principal effectively to authorize the acts of the purported agent at the time of the attempted ratification. If this principle had been called to his attention, it does not appear that the same result would have been reached.

(4). *The Limitations upon Curative Legislation in General Restrict the Power of Ratification.*

The Court in the *Heinszen* case recognized as limitations upon the power of ratification the limitations which apply generally to curative acts. The Court does not there lay down any formula by which the extent of the authority to enact curative legislation, retroactive in character, may be determined. On the other hand, the opinion does clearly show that it recognizes such limitations, though it considered that the *Heinszen* case came within principles permitting the enactment of curative legislation.

The Court seemed to place great reliance upon the fact that there was a tariff in existence when the goods were brought into the islands, and that it was illegal only because the proper legal authority had not been delegated by Congress to the President. The Court takes pains to show that not only could Congress have enacted the tariff itself but also that it could have delegated that authority to the President, and that the President under that authority

could have issued the same order which he issued. These facts afford the basis upon which it was held that the action in question in the *Heinszen* case comes within the permitted category. The Court would undoubtedly have reached a different conclusion in the *Heinszen* case if there had been any attempt to impose a tariff which was not in existence de facto at the time when the goods came into the islands.

Perhaps the best statement of the considerations which weigh with the court in determining whether legislation of a curative character may be constitutional in spite of its retroactivity is to be found in the opinion of Mr. Justice Holmes, when he was Chief Justice of Massachusetts, in the case of *Danforth v. Groton Water Co.*, 178 Mass. 472 (1901), where there was involved an act extending the time within which persons might file petitions for damages where water rights had been appropriated by the defendant company. The act was not passed until the year allowed by the original act for filing the petition had expired. Mr. Justice Holmes there stated:

> "Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some *slight technical defect* on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. United States*, 167 U. S. 518, 523, 524. But, however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

"In some such cases there has been at an earlier time an enforceable obligation, in others there never has been one, but in both classes the courts have laid hold of a distinction between the remedy and the substantive right, or have said that 'a party has no vested right in a defense based upon an informality not affecting his substantial equities', *Cooley, Const. Lim.* (6th Ed.) 454; or that 'there is no such thing as a vested right to do wrong,' *Foster v. Essex Bank*, 16 Mass. 245, 273; or have called it curing an irregularity, *Thomson v. Lee Co.*, 3 Wall. 327, 331, *Lane v. Nelson*, 79 Penn. St. 407, *Kreiger v. Randall*, 23 Wall. 137, or have dwelt upon the equities, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written Constitution from interfering with the power to make *small repairs* which a Legislature naturally would possess." (Italics ours).

The question was again presented to the Supreme Judicial Court of Massachusetts in the case of *Dunbar v. Boston & P. R. Corporation*, 181 Mass. 383 (1902). In this latter case the court stressed the very short time which elapsed between the expiration of the original statute and the passage of the remedial statute.

See also *Forbes Pioneer Boat Line v. Commissioners*, supra.

It is clear that the fact that the defect is only technical, or that only a short time has elapsed as between the expiration of the statute of limitations and the passage of the curative act, or that there is only some irregularity in legal proceedings, or that color of authority existed for what was done, and above all that substantial justice is furthered, are all elements which weigh very strongly in determining whether a curative act shall be held constitutional in spite of its retroactive effect. See the following authorities cited by Mr. Justice White in the *Heinszen* case at the pages referred to by him and at other pages.

Kent, Commentaries, Vol. 2, pages 415, 416 (Vol. 1, star pages 455, 456);

Cooley, Constitutional Limitations (7th Ed. 1903) pp. 528, 530, 543; (8th Ed. 1927) pp. 771, 773, 787.

The failure of Section 611 to comply with any of the conditions upon which curative legislation may be sustained is apparent. The only argument which might be made in support of sustaining it as curative legislation is that the right of Petitioner to recover rested only upon the statute of limitations and that that was merely a technical defense, and that substantial justice is promoted by abolishing the defense. This argument is best answered by Mr. Justice Holmes in the case of *Dunbar v. Boston & P. R. Corporation*, supra, where he said:

> "It cannot be said in more general terms that a statute of limitations as such embodies an arbitrary or merely technical rule. Prescription and limitation are based on one of the deepest principles of human nature, the working of association with what one actually enjoys for a long time, whatever one's defects of title may be, and of dissociation from that of which one is deprived, whatever may be one's rights. The mind like any other organism gradually shapes itself to what surrounds it, and resents disturbance in the form which its life has assumed. In cases like the present when the period of limitations is short no doubt other but also important elements are predominant,—the desirableness for business reasons of getting a quasi public transaction finished,—but whatever the details, the principle involved is as worthy of respect as any known to the law." (at p. 385).

In the present case there was not a short statute of limitations. The Government had five years from the filing of the return. There was no color of authority for collection; the statute of limitations clearly barred all right to collect. We maintain further that the right as well as the remedy was barred and that all liability for the tax was destroyed as effectively as if it never existed. These matters were called to the attention of Congress in 1926, and Congress repudiated all these collections. The doctrine of repudiation by the Legislature should certainly have a place in the doctrine of curative legislation and no curative act should be permitted after there has been repudiation.

Keeping before us the requirement indicated by the authorities just referred to, that curative legislation must work substantial justice, we should not overlook the fact that *Section* 611 *may apply to a collection made in* 1928 *on account of transactions and activities which produced income in* 1917 *or even in* 1909, *and applies to excise taxes as well as to income taxes.* Meanwhile all sorts of rights of third parties have intervened. Corporate stock and businesses might have been bought by purchasers who have relied upon the statutes and the decisions of this Court in concluding that certain excessive tax claims have been outlawed. A purchaser under such circumstances in the first part of 1928 might find that a collection which is later made, prior to the passage of the 1928 Act, is legalized by that Act. Original taxpayers, as well as the purchasers or transferees of their business, might have destroyed their books of accounts and records of ten, or perhaps almost twenty, years standing in reliance upon the statute and the decisions of this Court which would protect them from the stale demands of the Government for taxes. The burdens of Section 611 would fall as well upon taxpayers having a valid and meritorious defense to the tax claims of the Government, but who, relying upon the statutes and decisions, have not preserved the evidence necessary to support the merits of their cases. The statutes which the Government has held out as statutes of repose would thus be used as traps to ensnare such taxpayers.

We discuss below the unreasonably discriminatory, arbitrary and capricious character of the section which, far from working substantial justice, accomplishes the reverse.

(c) Section 611, apart from its Retroactivity is Unreasonably Discriminatory, Arbitrary and Capricious and Therefore in Violation of the Fifth Amendment.

We have discussed above, page 33, the power of Congress to impose *de novo* income and excise taxes in connection

with years and transactions long past. We do not believe this Court will uphold such impositions. But whether such taxes can be imposed *de novo* or whether collections previously made can in general be ratified, it is clear that any legislation in order to be constitutional must not be unreasonably discriminatory, arbitrary, capricious or whimsical, and we respectfully submit that this rule should apply with particular force to curative legislation which is impressed at the start with the unfairness of retroactivity, which unfairness may be overcome, if at all, only where such legislation accomplishes substantial justice. When subjected to this test, Section 611 is clearly seen to be in violation of the Fifth Amendment and void.

We shall undertake here to make a brief summary of some of the discriminatory and arbitrary features of the Section apart from its retroactivity. Others can no doubt be pointed out by persons more familiar with certain features of the administration of tax laws than are we. We therefore respectfully request your attention to all of the various briefs filed dealing with this subject.

(1) COLLECTION DELAYED ON ORAL APPLICATION. Section 611 makes the reimposition of the tax dependent upon whether a claim in abatement was filed within the statutory period. The filing of a claim in abatement had absolutely no legal effect. This the Government will admit. *See Article 1032 of Regulations 45.* The filing of a claim in abatement was no more effective legally to hold up the collection of a tax than was an oral request to the collector. *Many collectors did actually hold up for years the collection of taxes without the filing of any claim in abatement, upon the oral request* of persons whom they felt to be financially responsible, when good reason existed for not collecting the tax in the ordinary course. The presence or absence of a written claim in abatement was absolutely immaterial from any moral or legal standpoint. *The erroneous impression under which the Commissioner of Internal Revenue was laboring*

in delaying collection was not the result of the filing of the claim in abatement. The Commissioner thought that in any case he had an unlimited time within which to collect by distraint when assessment was made within time. The two cases are exactly on a par, and yet Section 611 covers one case and not the other, although all of the facts from a moral and legal standpoint are the same.

(2) COLLECTION DELAYED BY INABILITY TO FIND PROPERTY. In many cases collectors held up collection in the absence of claims in abatement, for the reason that no property of the taxpayers could be found on which to levy distraint. Certainly Section 611 is arbitrary and unjust in discriminating in favor of such taxpayers and against those who filed written claims in abatement to get a hearing on tax claims which they disputed. (See (6) page 48, infra).

(3) COLLECTION DELAYED BY CLAIM FOR CREDIT. Section 611 does not cover the situation where collection was held up beyond the statutory period as a result of the filing of a claim for credit. Claims for credit were provided for in *Articles* 1034 *and* 1035 *of Regulations* 45. Where a taxpayer claimed that he had overpaid his tax for one year he was allowed to file a claim for credit, asking that the overpayment be applied as a credit against an assessment of taxes which he admitted to be valid for another year. He was thus in a position to delay the collection of the assessment which he admitted to be valid. If this delay continued until after the expiration of the statute of limitations on the unpaid assessment, the taxpayer acquired a defense to the collection of such assessment. If a collection was made under such assessment after the expiration of the statute of limitations, whether the collection was by direct payment or by credit, the taxpayer is entitled under the provisions of the Revenue Act of 1928 to recover such sums. See Sections 607 and 609 of the Revenue Act of 1928. *G. C. M.* 6296, *VIII-2 Cumulative Bulletin* 152. It is not possible to

suggest a rational basis for distinguishing between a taxpayer in the circumstances just described, and one who succeeded in holding up collection of his tax by the filing of a claim in abatement rather than a claim for credit. And yet Section 611 of the Revenue Act of 1928 attempts to discriminate against one of these taxpayers in favor of the other. The claim for credit had just as much legal effect as a claim in abatement, and it operated just as fully, if not more so, in ordinary circumstances to have the collector hold up collection of a tax.

If there is any difference at all between the credit case and the abatement case the morals in favor of the taxpayer are stronger in the abatement case because where the claim for credit was filed it was generally admitted that the tax sought to be collected was actually due.

(4) TAXES PAID AND RECOVERED BEFORE 1928 ACT. Section 611 does not authorize collection to be made from those who delayed collections by claims in abatement, but who, prior to the Revenue Act of 1928, paid the tax and had recovered by administrative refunds or by suits taxes illegally collected after the statutory period therefor. See (5) below.

(5) ASSESSMENTS UNCOLLECTED WHEN 1928 ACT PASSED. Section 611 does not authorize collection to be made from those who delayed collections by claims in abatement until after the passage of the Revenue Act of 1928. The Bureau admits that Section 611 gives it no right to enforce collection after the Revenue Act of 1928. *Mimeograph* 3660, *VII-2 Cumulative Bulletin* 82. In the first draft of the Revenue Bill of 1928, Section 611 contained the following subsection:

> "(b) A distraint or proceeding in court for the collection of such part may be begun within one year after the enactment of this act."

The purpose of this provision was explained in the report of the House Ways and Means Committee in the following language:

> "*In order to prevent inequality*, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new act." House Report No. 2, page 34, 70th Congress, 1st Session.

The above provision which was inserted in the original bill "in order to prevent inequality" was stricken and the bill as it was enacted did not contain this provision. *House Report No.* 1882, *pages* 6, 22, 23, 70*th Congress*, 1*st Session.*

The Amendment referred to, instead of avoiding unconstitutionality, has tainted Section 611 with that inequality and unfair discrimination which the House sought to avoid by subsection (b) of the original draft of the section. Those taxpayers against whom the collectors happened to make their illegal demands, and who in response thereto had paid the taxes thus demanded prior to the enactment of the Revenue Act of 1928, are made to bear the burden of Section 611. But those taxpayers who were otherwise in identically the same situation, but upon whom the collectors did not happen to make the illegal demand, or who, by some contrivance or other, avoided compliance with the collector's demand for the payment of taxes until after the passage of the Revenue Act of 1928, are placed in a position of special favor and exemption. This discrimination was not wanted by the House, but the House swallowed the section in its amended form rather than lose the section in its entirety. It is submitted that this discrimination, the result of compromise, is so arbitrary and unreasonable that it renders the section unconstitutional.

The answer will probably be made to this argument which was made by the court in *Reeves v. Anderson*, supra, that in drafting statutes of limitations it is necessary to draw the line somewhere, and Congress felt that it should be

drawn at May 29, 1928. That would undoubtedly be sound as to statutes passed a reasonable time before May 29, 1928. Congress could make May 29, 1928, the date of the expiration of the statute. But when Congress attempts to legalize what has previously been illegal, and draws the line at the date of the enactment of the legalizing act so that it is by legislative prohibition impossible for the administrative officers of the Government to enforce the Act equally against those who were previously on a basis of equality, entirely different considerations are involved.

(6) DELAY CAUSED BY TAXPAYER DEMANDING HEARING BEFORE ASSESSMENT. Insofar as the provisions of Section 611 are concerned, there is no valid basis for distinguishing between the situation where assessments were not made until after a hearing, as provided under Section 250(d) of the Revenue Act of 1921, and the situation where the Commissioner made an assessment on account of a proposed deficiency, and the taxpayer filed a claim in abatement and had a hearing thereon. The statute of limitations on collection was five years in either case. In each case the taxpayer was in a sense delaying the collection by the Government of the amounts indicated to be due by the Government's preliminary investigation of which the taxpayer had been notified. The only difference was that the taxpayer who was granted the right to a hearing before the assessment was made would not have to pay any interest on any amount finally found to be due for any years prior to 1921, whereas when the assessment was made without giving him a hearing and he was required to file a claim in abatement interest ran immediately on whatever amount was found to be due. Compare Sections 250(b) and 250(e) of the Revenue Acts of 1918 and 1921. See also *Holmes, Federal Income Tax* (6th Ed. 1925) 1370.

In the latter case (where tax assessed and claim in abatement filed) the taxpayer also had the additional disadvantage of having an outstanding assessment against him and

having to depend upon the discretion of the collector as to whether he would collect.

If there is any difference between the two situations described above, it certainly does not furnish any basis for discrimination against the taxpayer who was not given the benefit of a hearing before assessment. If any distinction at all should be made we would have thought that the distinction should be in favor of the person who was required to file the claim in abatement against an assessment imposed upon him without reasonable opportunity for hearing. Yet Section 611 discriminates against him.

(7) SECTION 611 SEEMS TO DISTINGUISH BETWEEN PAYMENTS BY CREDIT AND OTHER PAYMENTS. Section 611 qualifies Section 607, but does not seem to qualify Section 609 (a) of the Revenue Act of 1928. Section 609 (a) declares invalid a credit against an alleged deficiency in tax which is barred by the statute of limitations. Insofar as Section 611 is concerned, there is no basis for a valid distinction between collection by distraint or by direct payment on the one hand, and collection by credit, whether at the request of the taxpayer or by the application of the Commissioner against the will of the taxpayer.

(8) DELAY ON BASIS OF DEFECTIVE WAIVERS. In many cases taxpayers delayed collection of taxes beyond the statutory period by filing waivers, which, in many instances, were defective. The defect in the waivers in many cases was due to a mistake of law on the part of the Commissioner of Internal Revenue as to the sort of waiver which would be effective and what acts on his part were necessary to make the waiver effective. Cf. *Charles H. Stange v. The United States*, United States Supreme Court, October Term, 1930, No. 23. Section 611 does not attempt to cover any such cases.

(9) CONCLUSION AS TO ARBITRARINESS AND DISCRIMINATION. Where assessments had been made "within the period of limitation properly applicable thereto," the Bureau of Internal Revenue mistakenly assumed that there was no limitation on the time within which it could enforce collection by distraint, and the Department Officials thus neglected to take proper steps for timely collection. The Bureau of Internal Revenue has, by procuring the enactment of Section 611, attempted to relieve itself of some of the damage caused by its mistaken view of the law. *But Section* 611 *fails to cover all cases where damage resulted from this same mistake of law. There was no mistake of law based upon the effect of a claim in abatement. The error was with reference to the effect of an assessment and not a claim in abatement. And the taxpayer no more induced the delay where a claim in abatement was filed than in any of the other cases where the Commissioner failed to act while protests of taxpayers were being heard or any other claims of taxpayers were being considered.*

It is undoubtedly true that Congress may make discriminations in taxation which are not geographical in their character. The Fifth Amendment does not prevent reasonable classification, but Congress most assuredly could not tax all red-headed people and provide that all black-headed people should go free. We may assume for the sake of argument that Congress can pass a statute providing that all persons during the last ten years who have escaped taxation on account of the running of the statute of limitations may now be taxed for the amounts they should have paid, or Congress might perhaps go further and provide that all persons who were notified within said period of the fact that a tax of so much was proposed against them would be subject to that tax, regardless of the period of limitations. But Congress certainly cannot provide that of those persons who have escaped taxation and who have been notified within the period of limitations of the proposed tax against

them, only those persons shall be taxed who filed a paper which had no legal or moral effect and in no way distinguished them from other taxpayers who were requesting additional time or further hearings before collection was enforced against them.

CONCLUSION

Section 611 should not be construed to have any effect upon taxpayer's right to recover by suit a tax erroneously or illegally assessed or collected, because collected after the statute of limitations had barred collection. It is clear that the provision that a payment covered by Section 611 "shall not be considered as an overpayment" does not prevent the payment from being a tax "illegally or erroneously assessed or collected." It is apparent from the use of "overpayment" and "taxes erroneously or illegally assessed or collected" elsewhere in the Revenue Acts that the terms are not synonymous, and it is further clear that "credit or refund" in the Revenue Acts refers generally to administrative action, and that when it is intended to prohibit suit for the recovery of taxes "erroneously or illegally assessed or collected" Congress has expressly prohibited suit and has not stopped with prohibiting "credit or refund."

"Stayed" should not be construed as synonymous with "delayed" and Section 611 should not be held to apply where collection was not actually stayed.

If Section 611 should be interpreted as barring recovery by suit as well as by administrative refund, it attempts only to take away the right of recovery without legalizing the collection. Upon this construction it is clearly unconstitutional because it takes away a right of action for an admitted wrong which is left undisturbed. Congress has no such power. While it could take away the right to sue the United States it cannot take away the right to sue the collector without substituting some other remedy.

Even if Section 611 attempts to legalize and ratify previously illegal collections or to ratify or reimpose a tax, the liability for which had become barred, it is unreasonably retroactive and would have been so even if enacted at the time when the collections were being made. And entirely aside from the evil of retroactivity it is unconstitutional, because it is so grossly discriminatory and capricious in seeking to bar recovery of taxes where a claim in abatement was filed and collection delayed, while omitting similar provisions for cases where delays of exactly the same character were equally brought about by taxpayers in other form requesting hearings and reconsideration before and after assessment.

Respectfully submitted,

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Counsel for Petitioner
Atlanta Trust Company Bldg.,
Atlanta, Georgia.

OF COUNSEL:

SAMUEL NESBITT EVINS,
ELBERT P. TUTTLE,
Atlanta, Georgia.

CLEMENT F. HAYNSWORTH,
Greenville, South Carolina.

APPENDIX 1.

THE EXPIRATION OF THE STATUTORY PERIOD OF LIMITATION ON COLLECTION OF INTERNAL REVENUE TAXES NOT ONLY BARS THE REMEDY OF COLLECTION BUT ALSO EXTINGUISHES ALL LIABILITY FOR THE TAXES. EFFECT ON MAIN ARGUMENT OF CONTRARY HOLDING.

The argument that the expiration of the statute of limitations provided in the Revenue Act extinguishes the liability and does not simply bar the remedy has been developed at length in a number of other briefs filed in the case of *Graham & Foster v. Goodcell*, No. 36, and companion cases. See the main brief for Petitioners in No. 36 at pages 53 to 59. We would only add a word here in support of that proposition.

It is true that common law rights, such as rights in contract and tort generally, are held to continue after the expiration of periods provided in general statutes of limitation. However this doctrine of the survival of the right after the extinguishment of the remedy does not apply even at common law to cases where adverse possession is held for the statutory period. This possession ripens into right.

The existence of a right without a remedy, while possible, presents an anomalous situation, and this Court has very clearly shown a tendency to restrict this anomaly within the smallest limits possible; and, as said in the case of *Davis v. Mills*, 194 U. S. 450, 454 (1904) a statute will be construed as limiting the *right* and not simply the *remedy* wherever it is possible to give it this construction.

The general rule that all provisions of taxing acts, including even limitations provisions, are to be construed most strongly in favor of the taxpayer, should also lead this Court to construe the limitations provisions of a taxing act as extinguishing the right and not simply the remedy, because certainly that is the construction most favorable to the taxpayer.

We are confident that the Court will hold that Section 250(d) of the Revenue Act of 1921 (and also Section 1320 of the same Act) extinguished the liability for the tax. Under Headings III and IV of our Argument we have made this assumption. However, if this Court should hold to the contrary, we do not think that this contrary holding would seriously affect the validity of the constitutional objections to Section 611 which we have raised under Headings III and IV.

The constitutional argument under Heading III (under which Heading it is assumed for the consideration of the constitutionality of Section 611 that it is to be construed as attempting to deprive taxpayer of his right of action without legalizing the wrong upon which the right of action is based) is very little, if at all, weakened, if it is held that the statute of limitations in the Revenue Acts barred the remedy only and did not extinguish the liability. Even if the remedy only was barred, still, the collection was clearly illegal when made, and the effect of Section 611, as construed under that Heading, is not the same as removing the bar of the statute of limitations as was done in the case of *Campbell v. Holt*, 115 U. S. 620 (1885). The statute in that case authorized, and made fully legal, the future collection by suit by lifting the bar of the statute which had already fallen. Section 611, if construed as we have assumed under Heading III, does not go far enough to remove the bar of the statute of limitations and make the collection legal, but simply bars recovery back of taxes illegally collected and for the recovery of which a right of action had vested, leaving the collection illegal.

All of the arguments as to the unreasonably discriminatory character of Section 611 which are made under Heading IV would apply with equal force whether the statute of limitations barred the right or only the remedy. We believe too that at the present time the Court, if it were called upon to do so, would sufficiently qualify or disregard the

doctrine of *Campbell v. Holt*, as suggested by Mr. Justice Holmes in *Danforth v. Groton Water Company*, supra, to make it inapplicable to a case where, as here, Congress goes back so far into the past to raise the bar of the statute of limitations on a statutory liability where that bar had fallen. It will be recalled that Mr. Justice Bradley wrote a strong dissenting opinion in *Campbell v. Holt*, in which dissent Mr. Justice Harlan concurred.

APPENDIX 2

Footnote 1, *Dissenting Opinion of Mr. Justice Brandeis, Untermyer v. Anderson*, 276 U. S. 440 (1928):

"The Act of August 5, 1861, chap. 45, 12 Stat. at L. 292, 309, applied to all incomes for the calendar year next preceding January 1, 1862. The Act of July 1, 1862, chap. 119, 12 Stat. at L. 432, 478, enacted higher rates, applicable to incomes for the year ending December 31, 1862. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. at L. 417, imposed an additional tax of 5 per cent on incomes for 1863 which had already been taxed at the rates established by the Act of 1862. The Act of June 30, 1864, chap. 173, 13 Stat. at L. 223, 281, applied to incomes for the then current calendar year. The Act of March 3, 1865, chap. 78, 13 Stat. at L. 469, 479, which again raised the rates, applied to income for the year ending December 31, 1865. The Act of March 2, 1867, chap. 169, 14 Stat. at L. 471, 477, also applied to income for the current calendar year. The Act of July 14, 1870, chap. 255, 16 Stat. at L. 256, 257, taxed incomes for the year commencing January 1, 1870, though the Act of June 30, 1864, chap. 173, 13 Stat. at L. 223, 283, of July 13, 1866, chap. 184, 14 Stat. at L. 98, 138, and of March 2, 1867, chap. 169, 14 Stat. at L. 471, 480, had provided that income arising after January 1, 1870, was to be free from tax. The Act of August 27, 1894, chap. 349, 28 Stat. at L. 509, 553, applied to incomes in the calendar year ending December 31, 1894. The Act of October 3, 1913, chap. 16, 38 Stat. at L. 114, 166, applied to incomes received subsequent to March 1, 1913. The Act of September 8, 1916, chap. 463, 39 Stat. at L. 756, applied to all income of that year. The increased rates established by the Act of October 3, 1917, chap. 63, 40 Stat. at L. 300, applied to incomes received during the calendar year commencing January 1, 1917. The Revenue Act of 1918, February 24, 1919, chap. 18, 40 Stat. at L. 1057, 1058, applied to incomes for the year 1918. Later Revenue Acts have been similarly retroactive with respect to the income tax: Act of November 23, 1921, chap. 136, 42 Stat. at L. 227; Act of June 2, 1924, chap. 234, 43 Stat. at L. 253, 254; Act of February 26, 1926, chap. 27, 44 Stat. at L. 9, 10 U. S. C., title 26, Section 1272."

FILE COPY

FEB 19 1931

CHARLES ELMORE CROP
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1930.

Nos. 323, 65, 400, 412.

SECOND NATIONAL BANK OF SAGINAW, TRUSTEE, *Petitioner.* *v.* THE UNITED STATES.	No. 323. *On Writ of Certiorari to the Court of Claims.*
PERCIVAL E. MAGEE, *Petitioner,* *v.* THE UNITED STATES.	No. 65. *On Writ of Certiorari to the Court of Claims.*
MASCOT OIL COMPANY, INC., *Petitioner,* *v.* THE UNITED STATES.	No. 400. *On Writ of Certiorari to the Court of Claims.*
ROY & TITCOMB, INC., *Petitioner,* *v.* THE UNITED STATES.	No. 412. *On Writ of Certiorari to the Court of Claims.*

PETITION FOR REHEARING.

THEODORE B. BENSON,
Washington, D. C.
Counsel for Petitioners.

Supreme Court of the United States.

OCTOBER TERM, 1930.

Nos. 323, 65, 400, 412.

SECOND NATIONAL BANK OF SAGINAW, TRUSTEE, *Petitioner*. *v.* THE UNITED STATES.	No. 323. *On Writ of Certiorari to the Court of Claims.*

PERCIVAL E. MAGEE, *Petitioner*, *v.* THE UNITED STATES.	No. 65. *On Writ of Certiorari to the Court of Claims.*

MASCOT OIL COMPANY, INC., *Petitioner*, *v.* THE UNITED STATES.	No. 400. *On Writ of Certiorari to the Court of Claims.*

ROY & TITCOMB, INC., *Petitioner*, *v.* THE UNITED STATES.	No. 412. *On writ of Certiorari to the Court of Claims.*

PETITION FOR REHEARING.

Comes now the above named petitioners, and present this, their petition for a rehearing of the above entitled causes, and, in support thereof, respectfully show:

With reference to the contention of the petitioners that to the extent that it conflicts therewith Section 611 of the Revenue Act of 1928 has been repealed by Section 3, of the Act of

May 29, 1928, c. 901, 45 Stat. 986, 996, the Chief Justice in the course of his opinion, in the case of R. E. Graham and E. E. Foster, Copartners doing business under the firm name of Millie Francis Oil Company, Petitioners, *v.* Goodcell et al, No. 36, followed in these cases, concludes:

1. There is no repugnancy between the provisions of the new law and those of the old.
2. The two laws were passed not only at the same session but on the same day.
3. Section 611 establishes a special rule.

The petitioners respectfully submit that Section 611 as construed by this Court is in direct conflict with and there is a positive repugnancy between its provisions and those of Section 3, of the Act of May 29, 1928, c. 901. In support of their position the petitioners beg to point out that under the provisions of Section 611 they are not entitled to recover while under the provisions of Section 3 of the later act they would be entitled to recover in the absence of the conflicting provisions in Section 611. The petitioners submit that the two statutes, the one giving the right to recover and the other denying it, furnish a clear example of a positive repugnancy.

In the course of the opinion the Chief Justice states that the two acts were passed not only at the same session but on the same day and that the hour of approval of the Act of May 29, 1928, does not appear. That Congress intended Section 3, of the Act of May 29, 1928, to prevail over anything to the contrary in Section 611 and to have full and complete force and operation for the payment of all refunds certified by the Commissioners and of all judgments of the courts, clearly appears from the subsequent Appropriation Bills in which special reference is made to Section 3, of the Act of May 29, 1928. This subsequent recognition by Congress should dispel any doubt as to its intent that Section 3 of the Act of May 29, 1928, should be the prevailing law and should be in full force and operation.

The Appropriation Bills approved December 20, 1928 (45 Stat. 1035) and May 15, 1930 (46 Stat. 342) provide for the re-

funding of taxes illegally collected—not for the refunding of overpayments—and in each specific reference is made to Section 3, of the Act of May 29, 1928. The latest act of Congress and in which is couched the most recent intent reads as applicable here:

> "Refunding taxes illegally or erroneously collected: For refunding taxes illegally or erroneously collected as provided by law, * * * *Provided*, That a report shall be made to Congress * * * as required by section 3 of the Act of May 29, 1928, * * *."

The petitioners submit that on three separate occasions, all subsequent to the enactment of Section 611, Congress has recognized the right of a taxpayer to the refund of all taxes illegally collected from him.

It is the position of the petitioners that the only *authority* possessed by the Commissioner of Internal Revenue to make a refund or by the courts to entertain a suit for the recovery of a tax is that conferred by Section 3, of the Act of May 29, 1928, Section 3220 of the Revised Statutes, and that no refund can be made pursuant to the provisions of Section 607 of the Revenue Act of 1928.

Counsel for petitioners has never taken the position that Section 607 and Section 611 apply to the authority of the Commissioner in any different manner from which they apply to the courts. It is true that such position was possibly taken by other petitioners but counsel has consistently maintained that authority for the refund of a tax or the payment of a judgment of a court is that contained in Section 3220 of the Revised Statutes, as clearly recognized by Congress in subsequent Appropriation Bills. Counsel has never taken the position that the authority of the Commissioner to make a refund or the jurisdiction of the courts to render judgment for a refund are in any wise different.

The conclusion of the Court that Section 611 establishes a special rule for a particular situation is in effect that Section 611 is special and that Section 3, of the Act of May 29, 1928, c. 901, general and that the special legislation prevails over the general on the theory that Section 611 is an exception to the

general statute. The petitioners, however, desire to call attention to the fact that Congress enacted Section 611 as an exception to Section 607 and not as an exception to Section 3220 of the Revised Statutes as amended by Section 3, of the Act of May 29, 1928. The conclusion reached by the Court is therefore in effect that a tax can not be refunded or sued for under Section 3220 of the Revised Statutes but under Section 607 of the Revenue Act of 1928. This the petitioners submit conflicts with the clear intent of Congress as expressed in Section 3, of the Act of May 29, 1928, c. 901, and in the subsequent Appropriation Bills.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgments of the Court of Claims be, upon further consideration, reversed.

Respectfully submitted,

THEODORE B. BENSON,
Washington, D. C.
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I, Theodore B. Benson, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of these causes is presented in good faith and not for delay.

THEODORE B. BENSON,
Counsel for Petitioners.

FILE COPY

Office Supreme Court, U.
FILED
SEP 19 1930
CHARLES ELMORE CROP
CLERK

No. 823

In the Supreme Court of the United States

OCTOBER TERM, 1930

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, MICHIGAN, TRUSTEE OF THE ESTATE OF WELLINGTON R. BURT, DECEASED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 323

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, Michigan, trustee of the estate of Wellington R. Burt, deceased, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition in this case.

The question presented is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (R. 3), should be construed to deprive the petitioner of the right which it otherwise would have had to recover taxes which had been collected after the statutory period of limitations had expired, and if so construed, whether it is in violation of the Fifth Amendment.

This question is the same as that involved in *Graham and Foster, Co-partners, etc.* v. *Goodcell, Collector*, No. 36, October Term, 1930, certiorari granted March 3, 1930; *Percival E. Magee* v. *United States,* No. 65, October Term, 1930, certiorari granted May 19, 1930; *Oak Worsted Mills* v. *United States,* No. 104, October Term, 1930, certiorari granted June 2, 1930; and *Taft Woolen Company* v. *United States,* No. 105, October Term, 1930, certiorari granted June 2, 1930, cases which are now before this Court. The facts are substantially the same in the instant case as in those cases. In three of those cases, suit was brought before the passage of the Act of 1928, but the instant case and the *Magee case* were brought after its passage.

The pertinent dates in the instant case are as follows (R. 11, 12, 13):

April 1, 1918, return for 1917 filed.

January, 1921, additional assessment made.

February 17, 1921, claim in abatement filed.

November 23, 1922, part payment made by credit of overpayment of taxes for 1920.

April 1, 1923, expiration of five year period for assessment and collection of tax.

May 24, 1923, claim in abatement rejected.

October 12, 1923, tax collected.

July 11, 1927, claim for refund filed.

September 1, 1928, claim for refund rejected.

February 4, 1929, suit brought.

The Court of Claims held that Section 611 of the Revenue Act of 1928 barred recovery. (R. 13.)

Since the same question is already before this Court in several pending cases, the United States does not oppose the granting of the writ of certiorari.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
LISLE A. SMITH,
BRADLEY B. GILMAN,
ERWIN N. GRISWOLD,
Attorneys.

SEPTEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

CLERK

Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 337

BOSTON PRESSED METAL COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 8, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,259)

(35,259)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 337

BOSTON PRESSED METAL COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1] IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 337

BOSTON PRESSED METAL COMPANY, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MAY IT PLEASE THE COURT:

The petition of the Boston Pressed Metal Co. respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved

The petitioner, a corporation, filed its Federal income tax return for the year 1918 and paid taxes shown thereon in the amount of $30,532.77. In 1921 an additional tax of $13,299.65 was assessed against the petitioner. This assessment was not paid. On August 27, 1924 the Commissioner of Internal Revenue allowed an overassessment to the petitioner for the year 1918 in the amount of $22,530.14 of which $13,299.65 was applied as an abatement of the prior assessment in the same amount, $5,938.11 was credited against an additional tax for the year 1920 and the balance, $3,844.94, the amount involved in this proceeding, was credited against a tax claimed to be due from the petitioner for the year 1917.

The return for 1917 was filed on March 30, 1918. On March 7, 1921 the Commissioner of Internal Revenue made an additional assessment for the year 1917. On February 24, 1921 the petitioner filed a claim for abatement covering this additional assessment and also the additional assessment of $13,299.65 for 1918. The 1918 assessment was later abated in full.

The balance of the overassessment of $3,844.94 for the year 1918 was credited against the outstanding assessment [fol. 2] for the year 1917, above referred to, on January 7, 1925.

The petitioner filed suit in the Court of Claims asking judgment for $3,844.94, the overassessment found and allowed by the Commissioner of Internal Revenue for the year 1918 on the ground that the credit of that amount against the outstanding tax for the year 1917 was void because it was made after the expiration of the statute of limitations on collection of taxes for the year 1917.

The Court held that although the credit was made after the statute of limitations had expired with reference to the taxes for 1917 no recovery would be allowed because of the provisions of Section 611 of the Revenue Act of 1928.

Questions Presented

1. Do the provisions of 611 of the Revenue Act of 1928 (C. 852, 45 Stat. 875) apply to this case?

2. Assuming that the provisions of Section 611 of the Revenue Act of 1928 are applicable to this case, does the record establish that the collection of the tax was stayed within the meaning of Section 611 of the Revenue Act of 1928?

3. Is Section 611 of the Revenue Act of 1928 constitutional?

Reasons Relied on for the Allowance of the Writ

1. The questions involved in this case with reference to Section 611 of the Revenue Act of 1928 are substantially the same as those involved in the cases of Graham and Foster, Co-partners, etc. petitioners v. Goodcell, Collector, No. 589, October Term, 1929, in which case this Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on March 3, 1930, and Oak Worsted Mills, petitioner, v. The United States, No. 104, October Term, 1930 and Taft Woolen Co., petitioner v. The United States, defendant, No. 105, October Term, 1930, in which cases this Court granted writs of certiorari to the Court of Claims on June 2, 1930.

2. In addition to the questions involved in the above cases, this case involves a question of whether or not Sec-
[fol. 3] tion 611 has any application to a case in which the petitioner is suing to recover an overpayment allowed by the Commissioner of Internal Revenue for a year in which

no claim for abatement was filed, which overpayment instead of being refunded to the petitioner was credited against a tax for another year at a date when the collection of said tax was barred by statute.

The decision of the Court below on this question is in conflict with the decision of the United States District court for the Northern Division of Ohio in the Peerless Paper Box Manufacturing Company v. Routzahn (22 Fed. (2d) 459).

Wherefore your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the court of Claims be granted, and that said judgment of the Court of Claims may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Boston Pressed Metal Company, by Harry Friedman, Attorney for Petitioner.

[fol. 4] [Endorsed:] In the Supreme Court of the United States, October Term, 1930. Boston Pressed Metal Co., petitioner, v. The United States, respondent. Petition for write of certiorari to the Court of Claims. Harry Friedman, Attorney and Counsellor at Law, Earle Building, Washington, D. C.

[fol. 1]

COURT OF CLAIMS OF THE UNITED STATES

No. K-99

BOSTON PRESSED METAL COMPANY, Claimant,

v.

THE UNITED STATES, Defendant

I. PETITION—Filed March 27, 1929

To the Honorable the Court of Claims and to the Honorable the Judges thereof:

The claimant, the Boston Pressed Metal Company, by this, its petition, respectfully shows:

(1) The claimant at all times hereinafter mentioned and at all times material to this proceeding was and is a corporation organized and existing under the laws of the State of Massachusetts, engaged in the metal stamping business, with its principal office and place of business at Worcester, Massachusetts.

(2) The claimant has a just claim against the defendant for $3,844.94 Federal income and profits taxes overpaid for the year 1918 and illegally retained by the defendant, to-[fol. 2] gether with interest thereon at 6 per cent per annum from the date paid until repaid to the claimant.

(3) The claimant filed its income and profits tax return for the year 1918 on or about March 15, 1919, and paid taxes thereon in the amount of $30,530.24, to the Collector of Internal Revenue, Boston, Massachusetts. Thereafter on or about October 23, 1924, the Commissioner of Internal Revenue found and allowed an overassessment in the amount of $22,530.14, of which $13,299.65 was applied as an abatement to an unpaid additional tax for the year 1918, $5,385.55 as a credit against an additional tax of $5,385.55 for the year 1920, leaving a balance refundable to the taxpayer of $3,844.94.

(4) Thereupon, the Commissioner of Internal Revenue, instead of refunding said balance of $3,844.94 to the claimant erroneously and illegally credited same against alleged taxes for the year 1917 in the same amount.

(5) The income and profits tax return of the claimant for the year 1917 was filed on March 30, 1918.

(6) The aforesaid overpayment of $3,844.94 for the year 1918 was credited against the additional taxes for the year 1917 on, to wit, October 23, 1924, a date more than five years after the return for 1917 was filed.

(7) Claims and demands have been filed with the Commissioner of Internal Revenue for the refund of the aforesaid overpayment of $3,844.94 but the Commissioner refuses to make and has not made said refund.

(8) Section 609 (a) of the Revenue Act of 1928 provides that:

"Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability [fol. 3] would be considered an overpayment under Section 607."

Section 607 of the Revenue Act of 1928 provides that:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitations properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claims."

Section 277 (a) (2) of the Revenue Act of 1924 provides that:

"The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

(9) The claimant has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is and always has [fol. 4] been the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set-offs.

(10) The claimant believes the facts as hereinabove stated to be true.

Wherefore the claimant prays judgment in its favor against the United States of America for the sum of $3,844.94, with such interest and costs as are allowable by law.

Boston Pressed Metal Company. R. M. Cook, President. Harry Friedman, Attorney for Claimant, 653 Earle Building, Washington, D. C. Boston Pressed Metal Company, Maine. (Corporate Seal, 1906)

[fol. 5] *Duly sworn to by R. M. Cook. Jurat omitted in printing.*

[fol. 6] II. General Traverse—Filed May 6, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.
C. R. P.

III. Argument and Submission of Case

On April 14, 1930, this case was argued and submitted on merits by Mr. Harry Freidman, for the plaintiff, and by Mr. C. R. Pollard, for the defendant.

[fol. 7] IV. Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green, J.—Entered June 2, 1930

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of the parties, makes the following

Special Findings of Fact

1. Plaintiff is a corporation, and on March 30, 1918, filed an income and profits tax return for the calendar year 1917, and paid the same during 1918. In December, 1919, the

commissioner made an additional assessment, which was paid; and a further additional assessment on January 7, 1921, in the amount of $6,277.77, upon which on June 5, 1925, there was a balance owing on the tax of 1917 of $3,844.94.

On June 16, 1919, plaintiff filed an income and profits tax return for the calendar year 1918 disclosing a tax of $30,532.27, and paid the same during 1919, the last installment being paid on December 17, 1919. On January 7, 1921, the commissioner made an additional assessment against the plaintiff for the year 1918 of $13,299.65.

2. A claim for refund for $19,455.86 was filed by plaintiff on May 22, 1920. A claim for abatement for the sum of $19,577.42 (being $6,277.77 for the 1917 period and $13,299.65 for the 1918 period) was filed by plaintiff on February 24, 1921; on the same date a claim for refund for $5,938.11 was filed. On March 15, 1921, plaintiff filed a claim for a credit for the sum of $5,938.11. All of these claims were rejected in full by the commissioner on August 20, 1924.

On March 3, 1924, plaintiff filed a claim for refund for $25,000 for the year 1918. On August 27, 1924, the commissioner allowed the claim in the sum of $22,530.14 and rejected it for the balance of $2,469.86, and made a certificate of overassessment accordingly.

3. On January 7, 1925, the sum of $13,299.65 was abated on the additional assessment for 1918; $5,385.55 was applied as a credit against the additional tax of that amount for [fol. 8] the year 1920; and $3,844.94, the amount now in suit, was credited by the collector against the unpaid additional assessment for the year 1917.

4. On March 12, 1925, plaintiff filed a claim for refund in the sum of $22,530.14 for the year 1918. This claim was rejected by the commissioner on July 23, 1925.

5. On July 14, 1928, plaintiff filed a claim for refund for $6,277.77, as well as $2,432.83 paid by plaintiff on June 5, 1925, which includes the amount of $3,844.94 now in suit, upon the ground that the tax was collected after the statutory period in which collection could legally be made had expired. The commissioner rejected this claim.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

GREEN, Judge, delivered the opinion of the court:

This is an action to recover taxes on the ground that they were paid after the expiration of the period of limitations.

The plaintiff filed its Federal income tax return for the year 1917 on March 30, 1918. An additional assessment for said year was made in December, 1919, and a further additional assessment on January 7, 1921, in the amount of $6,277.77. A claim for the abatement of said tax in the sum last mentioned was filed February 24, 1921, which was rejected in full on August 20, 1924. Of this amount plaintiff paid in cash $2,432.83 on June 5, 1925, leaving a balance owing for said year in the amount of $3,844.94.

The plaintiff filed its income tax return for 1918 on June 16, 1919, disclosing a tax of $30,532.27. This tax was paid in installments, the last payment being made on December 17, 1919. An additional assessment for said year was made on January 7, 1921 in the amount of $13,299.65. A claim for the abatement of said additional tax in the same amount was filed on February 24, 1921, and rejected August 20, 1924. On March 3, 1924, plaintiff filed a claim for refund for $25,000 for the year 1918. This claim on August 27, 1924, was rejected in the amount of $2,469.86 and allowed for $22,530.14. This allowance of $22,530.14 upon the claim for refund was applied by the collector as follows: $13,299.65 to the unpaid additional assessment for the year 1918, above referred to; $5,385.55 as a credit against an additional tax for the year 1920; and $3,844.94 was credited January 7, 1925, against the unpaid additional assessment for the year 1917. It will be observed in connection with

this last credit that it was made after the statute of limitations had expired with reference to the taxes of 1917, but before the passage of the 1926 revenue act, and it is for this amount and on account of its application after the expiration of the period of limitations that plaintiff brings this suit.

[fols. 9 & 10] We have heretofore held in the case of Oak Worsted Mills v. United States, 68 C. Cls. 539, upon similar facts, that where a tax has been assessed in time, a plea in abatement has been filed, the collection of the tax stayed, the plea in abatement determined, and the amount found to be due collected, there can be no recovery of the amount so collected, notwithstanding the collection was made after the period of limitations for the collection of the tax had expired. This holding was based upon sections 607 and 611 of the revenue act of 1928. See Oak Worsted Mills v. United States, supra; Gotham Can Co. v. United States, 68 C. Cls. 749; and Mascot Oil Co. v. United States, No. K-67, decided June 2, 1930. It is contended on behalf of plaintiff that this case differs from those cases in that the amount which is sought to be recovered was collected by taking it out of a refund allowed and crediting it upon a tax for a previous year as to which the limitation for collection had expired, and that the amount so credited can be recovered under the provisions of section 609 (a) of the revenue act of 1928, which reads as follows:

"Sec. 609. Erroneous Credits.—(a) Credit Against Barred Deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607."

We do not think this contention is well founded, but consider it clear that under the express language of section 609 the credit is treated as a "payment in respect of such liability" against which ("against the liability") the credit is taken. When the collector applied part of the money, which was due on the refund, to another tax, the relation of plaintiff and defendant to the transaction so far as this question is concerned was in law the same as if the collector had received cash from the plaintiff; and by the express language of section 609 the question of whether it is to be

considered an overpayment, and hence recoverable, is to be determined under section 607, which in turn under its provisions depends on section 611. We therefore consider the question involved in the case at bar the same as that heretofore decided in the cases cited.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 11] V. JUDGMENT OF THE COURT—June 2, 1930

At a Court of Claims held in the City of Washington on the 2d day of June, A. D. 1930, judgment was ordered to be entered as follows:

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

No printing having been done by the court in this case, no costs are taxed.

[fol. 12] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is advanced and assigned for hearing immediately following case No. 323, Second National Bank of Saginaw, Saginaw, Michigan, Trustee, etc., vs. The United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
SEP 17 1930
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 337.

BOSTON PRESSED METAL CO., *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

HARRY FRIEDMAN,
Attorney for Petitioner.

Munsey Building,
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 337.

BOSTON PRESSED METAL CO., *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

OPINION OF THE COURT BELOW.

The opinion of the Court of Claims has not been officially reported. It was rendered by the Court below on June 2, 1930, and will be found printed in the record at pages 8 and 9.

II.

JURISDICTION.

The jurisdiction of this court is invoked under Section 3 (b) of the Act of February 13, 1925 (43 Stat. 936).

The final judgment of the Court of Claims was entered on June 2, 1930 (R. 10). Application for writ was presented August 8, 1930.

The suit brought in the Court of Claims is for the recovery of an overassessment of corporation income and profit taxes collected for the year 1918, illegally retained by the defendant, jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

THE FACTS.

The facts of the case are printed in the petition (R. 1 and 2) and to avoid repetition, counsel begs leave to refer thereto.

IV.

STATUTES INVOLVED.

The statutes involved in this case are printed in the petition (R. 4-5) and to avoid repetition, counsel begs leave to refer thereto.

V.

SPECIFICATION OF ERRORS TO BE URGED.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the review and reversal of the decision of the Court of Claims are:

1. The Court below erred in finding and holding that Section 611 of the Revenue Act of 1928 is applicable to this case.

2. The Court below erred in finding and holding that the collection of tax was "stayed" within the meaning of the Section 611 of the Revenue Act of 1928.

3. The Court below erred in failing to find and hold that the application of Section 611 to this case will render that Section unconstitutional.

VI.

THE ARGUMENT.

Summary of Argument.

A. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The 1918 overassessment sought to be recovered in this case was not covered by a claim for abatement.
2. They are not applicable.
3. They should not be given retroactive effect.
4. The collection of no part of the tax for 1917 was "stayed" by a claim for abatement or otherwise.

B. The application of Section 611 of the revenue Act of 1928 to this case would render it unconstitutional for the following reasons:

1. The power conferred on Congress by the Sixteenth Amendment is limited to the laying and collecting of taxes on income.

2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

THE ARGUMENT.

The Provisions of Section 611 of the Revenue Act of 1928 do Not Apply.

In this case the petitioner sued for a recovery of an overassessment already allowed by the Commissioner of Internal Revenue for the year 1918. There was no claim for abatement filed for the year 1918 which was applicable to the amount of this overassessment. Instead of refunding the overassessment to the petitioner the Commissioner of Internal Revenue credited said overassessment against an alleged tax for the year 1917. The credit was made at a date when collection of the tax for 1917 would have been illegal because of the provisions of Section 277 (a) (2) of the Revenue Act of 1924. A claim for abatement had been filed for the year 1917, but there is no finding by the Court to establish that the collection of the 1917 tax was "stayed" within the meaning of Section 611 nor is it material in this case whether or not a claim for abatement was filed for 1917, as this suit is not a suit for the recovery of a tax paid for 1917, but for the recovery of an overassessment already allowed for the year 1918.

The decision below is contrary to and in conflict with the decision of the District Court of the United States for the Northern Division of Ohio in Peerless Paper Box Manufacturing Company (22 F. (2d) 459) and the published rulings of the Commissioner of Internal Revenue (L. O. 1095) (I-1 C. B. 313).

Section 611, if Construed to Apply, Would Be Unconstitutional.

This Court on March 3, 1930, granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on the petition of Graham & Foster, Co-partners, etc. v. Goodcell, Collector, No. 589, October Term 1929, to review the decision of that Court with reference to the application and constitutionality of Section 611 of the Revenue Act of 1928. This Honorable Court has granted similar writs in Oak Worsted Mills v. The United States and Taft Woolen Co. v. United States Nos. 104 and 105, October Term 1930. The application and constitutionality of Section 611 are also presented in the petition in this case and counsel respectfully submits that the same reasons exist for the allowance of the writ as were presented to the Court by the petitioners in the above-mentioned cases.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for and demanding the exercise by this Court of its supervisory powers in order that there may be a final determination of the authority of the Commissioner of Internal Revenue to retain an over-assessment already allowed and to apply such over-assessment against a tax barred for collection by the statute of limitations; and that there may be a final determination of the construction and constitutionality of the provisions of Section 611 of the Revenue Act of 1928 and that to such ends the writ of certiorari should be granted and this Court should review

the decision of the Court of Claims and finally reverse it.

HARRY FRIEDMAN,
Attorney for Petitioner.

Munsey Building,
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 337.

BOSTON PRESSED METAL CO., *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF ON BEHALF OF PETITIONER.

HARRY FRIEDMAN,
Attorney for Petitioner

Munsey Building,
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 337.

BOSTON PRESSED METAL CO., *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

BRIEF ON BEHALF OF PETITIONER.

I.

OPINION OF THE COURT BELOW.

The opinion of the Court of Claims has not been officially reported. It was rendered by the Court below on June 2, 1930, and will be found printed in the record at pages 8 and 9.

II.

JURISDICTION.

The jurisdiction of this court is invoked under Section 3(b) of the Act of February 13, 1925 (43 Stat. 926).

The final judgment of the Court of Claims was entered on June 2, 1930 (R. 10). Application for writ was presented August 8, 1930 (R. 1), and granted on October 20, 1930.

The suit brought in the Court of Claims is for the recovery of an overassessment of corporation income and profit taxes collected for the year 1918, illegally retained by the defendant, jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

STATEMENT OF THE CASE.

The petitioner, a corporation, filed its Federal income tax return for the year 1918 and paid taxes shown thereon in the amount of $30,532.77. In 1921 an additional tax of $13,299.65 was assessed against it. This assessment was not paid. On August 27, 1924 the Commissioner of Internal Revenue allowed an overassessment to the petitioner for the year 1918 in the amount of $22,530.14 of which $13,299.65 was applied as an abatement of the prior assessment in the same amount, $5,938.11 was credited against an additional tax for the year 1920 and the balance, $3,844.94, the amount involved in this proceeding, was credited against a tax claimed to be due from the petitioner for the year 1917.

The return for 1917 was filed on March 30, 1918. On January 7, 1921 the Commissioner of Internal Revenue made an additional assessment for the year 1917. On February 24, 1921 the petitioner filed a claim for abatement covering this additional assessment and also the additional assessment of $13,299.65 for 1918. The 1918 assessment was later abated in full.

The balance of the overassessment of $3,844.94 for the year 1918 was an overpayment and was credited against the outstanding assessment for the year 1917, above referred to, on January 7, 1925, a date more than five years after the filing of the return for 1917.

The petitioner filed suit in the Court of Claims asking judgment for $3,844.94, the overpayment found and allowed by the Commissioner of Internal Revenue for the year 1918 on the ground that the credit of that amount against the alleged tax for the year 1917 was void because it was made after the expiration of the statute of limitations on collection of taxes for the year 1917.

The Court held that although the credit was made after the statute of limitations had expired with reference to the taxes for 1917, no recovery would be allowed because of the provisions of Section 611 of the Revenue Act of 1928.

IV.

STATUTES INVOLVED.

The pertinent provisions of law are Sections 607, 609(a) and 611 of the Revenue Act of 1928 reading as follows:

"Sec. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 609(a). Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607."

"Sec. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitations on assessment and collection."

V.

SPECIFICATION OF ERRORS TO BE URGED.

The errors which the petitioner urges as grounds for the reversal of the decision of the Court of Claims are:

1. The Court below erred in finding and holding that Section 611 of the Revenue Act of 1928 is applicable to this case.

2. The Court below erred in holding that the col-

lection of tax was "stayed" within the meaning of the Section 611 of the Revenue Act of 1928.

3. The Court below erred in failing to find and hold that the application of Section 611 to this case will render that Section unconstitutional.

THE ARGUMENT.

Summary of Argument.

A. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The 1918 overpayment sought to be recovered was not covered by a claim for abatement.
2. They are not applicable to credits.
3. The collection of no part of the tax for 1917 was "stayed" by a claim for abatement or otherwise.

B. The application of Section 611 of the Revenue Act of 1928 to this case would render it unconstitutional for the following reasons:

1. The power conferred on Congress by the Sixteenth Amendment is limited to the laying and collecting of taxes on income.
2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

VI.

THE ARGUMENT.

The Provisions of Section 611 of the Revenue Act of 1928 do not Apply to This Case.

1. *The 1918 overpayment sought to be recovered was not covered by a claim for abatement.*

The petitioner brought suit in the Court of Claims to recover an overpayment in the amount of $3,844.94 allowed by the Commissioner of Internal Revenue for the year 1918. There was no claim for abatement filed for the year 1918 which was applicable to the amount of this overpayment. As there was no claim for abatement filed covering the tax sought to be recovered, Section 611 of the Revenue Act of 1928 can have no effect. By its express words it relates only to cases in which "a claim for abatement was filed * * *."

2. *Section 611 does not apply to a "credit" made after the expiration of the statutory period of limitations.*

The overpayment allowed the petitioner for the year 1918 was not refunded to it, but was credited against an assessment made for the year 1917. At the time the credit was made it was too late to collect the assessment for the year 1917 because of the provisions of Section 277 (a) (2) of the Revenue Act of 1924. Bowers v. New York & Albany Lighterage Co., (273 U. S. 346); Russell v. United States, (278 U. S., 181).

The offsetting of the allowable overpayment for 1918 against the barred assessment for 1917 did not give the Government the right to retain the amount allowed as an overpayment. The taxpayer should be permitted to recover the overpayment already al-

lowed. Peerless Paper Box Mfg. Co. v. Routzahn, (22 Fed. (2d) 459).

In L. O. 1095 (1-I C. B. 313) the Solicitor of Internal Revenue stated:

> "The Government itself insists on the benefit of the statute of limitations and holds that a refund due a taxpayer cannot be applied on a later tax when the amount refundable is barred by the statute. It is believed both in good conscience and by legal right the same rule must apply when it works to the advantage of the taxpayer."

The Court below held that the ex parte withholding of an overpayment should be considered the same as a voluntary payment by the petitioner. There is much difference between an ex parte withholding by the collector and a voluntary payment by the taxpayer and the Revenue Act of 1928 treats with them separately and differently. If Congress had intended a void credit to constitute a payment as the Court below held, there was no necessity for Section 609(a). If the *void credit* was a *payment* it would already have been under the express language of Section 607, and Section 609(a) would be meaningless. Consequently, to adopt the interpretation of the Court below would be to impute to Congress the use of superfluous language. This the Courts will not do.

> Platt v. Union Pacific Railroad Co., (99 U. S. 48).
> United States v. Lexington Mill Elevator Co., (232 U. S. 399).
> Wiborg v. United States, (163 U. S. 632).

Every word of a statute is to be given effect. Wilmot v. Mudge, (103, U. S., 217); Early v. Doe ex Dem Homans, (16 How., 610).

If Congress had intended void credits to have been modified by Section 611, it would have either used the word "credited" in Section 607 and omitted Section 609(a) entirely, or it would have inserted in Section 609 a qualification referring to and incorporating therein the substance of Section 611—for example by the use of the clause "except as provided in Section 611". The failure of Congress to follow either one of these two courses is highly persuasive that the form of the statute in this connection was deliberate and that it was intended that Section 609(a) should be given its literal effect and should not be modified in any manner by Section 611. Added force is given to this conclusion from the circumstances that Section 611 follows in order both Section 607 and Section 609.

That Congress intended to distinguish between actual payments by the taxpayer (covered by Sections 607 and 611) and mere *ex parte* credits by the Commissioner (covered by Section 607 and 609(a)) may be the more easily accepted because, it is submitted, Congress ought to have intended this distinction. The situation of a taxpayer who voluntarily pays a tax, is entirely different from the situation of a taxpayer whose money, in the hands of the Commissioner and representing an acknowledged overpayment for one year, is summarily applied by the Commissioner against an alleged tax liability of another year. In the former case the taxpayer has his opportunity to contest the correctness of the tax by an appeal to the Board of Tax Appeals before payment. In the later case the taxpayer is absolutely helpless, being without even the opportunity to argue his case to the Commissioner or to point out the illegality of the proposed action to the Board of Tax Appeals.

It should be noted that the respondent must rely not upon any express statutory provision but upon an implication. To sustain the Court below it must be argued that the express provision of Section 609(a) carries the implication that a credit against a liability, payment of which would be an overpayment under Section 607, shall not be void and that the phrase "under Section 607" should be construed as *"under Section 607 as limited by Section 611."* In other words, the respondent's case requires that the court should imply a negative provision where the statute merely expresses a positive provision.

If Congress had intended a void eredit to fall under the terms of Section 611 it would have done one of two things—either added to Section 609(a) "except as provided in Section 611" or have inserted the word "credited" in Section 607 and omitted Section 609(a) from the law. It has done neither and we submit that this shows a clear intent to differentiate between payments and credits.

3. *The collection of no part of the tax for 1917 was "stayed" by a claim for abatement or otherwise.*

There was no "stay" of the collection of the tax sought to be recovered. The Court below did not find that the collection of the tax for 1918 was "stayed", and erroneously considered this case as if it were a suit to recover the 1917 tax against which the credit was applied, but even on that theory Section 611 could have no application in this case for, while there was a claim for abatement filed for the year 1917, *there is no finding nor any facts from which the court could have found that "the collection of any part thereof (1917 tax) was stayed".*

Assuming (for the sake of argument only) Section 611 could be considered as modifying Section 609, on the facts in this case Section 611 can not be applied because there is neither a finding nor facts to show that collection of the 1917 tax was "stayed" by a claim for abatement or otherwise.

SECTION 611, IF CONSTRUED TO APPLY, WOULD BE UNCONSTITUTIONAL.

This case has been assigned to follow other cases involved related questions, including that of the application and constitutionality of Section 611 of the Revenue Act of 1928. As those questions have been comprehensively briefed in the other cases counsel begs leave to refer to those briefs in lieu of repeating arguments already made to this Honorable Court.

CONCLUSION.

In conclusion, it is respectfully submitted that the decision of the Court of Claims should be reversed.

HARRY FRIEDMAN,
Attorney for Petitioner.

Munsey Building,
Washington, D. C.

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No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1930

BOSTON PRESSED METAL COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 337

BOSTON PRESSED METAL COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition in this case.

The question presented is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, should be construed to deprive the petitioner of the right which it otherwise would have had to recover taxes for the year 1917 which had been paid by application of a credit of part of an overpayment of 1918 taxes after the statutory period of limitations for collection of the 1917 taxes had expired, and if so construed, whether that section violates the Fifth Amendment.

This question includes that involved in *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*,

No. 36, October Term, 1930, certiorari granted March 3, 1930; in *Magee* v. *United States,* No. 65, October Term, 1930, certiorari granted May 19, 1930; in *Oak Worsted Mills* v. *United States,* No. 104, October Term, 1930, certiorari granted June 2, 1930; and in *Taft Woolen Company* v. *United States,* No. 105, October Term, 1930, certiorari granted June 2, 1930, cases which are now before this Court.

Except as to the collection, the facts are substantially the same in the instant case as in those cases. In those cases the tax in dispute was collected. In the instant case the tax was paid by application of a credit from an overpayment of taxes for the subsequent year. It seems unnecessary to discuss at this time the petitioner's contention that its position, because of this distinction, is better than that of the taxpayer in the cases mentioned above.

In the instant case, as in the case of *Magee* v. *United States, supra,* suit was brought after the passage of the Revenue Act of 1928.

The pertinent dates in the instant case are as follows (R. 6, 7):

March 30, 1918, return for 1917 filed.

June 16, 1919, return for 1918 filed.

January 7, 1921, additional assessments of taxes for 1917 and 1918 made.

February 24, 1921, claim in abatement for 1917 and 1918 taxes filed.

March 30, 1923, expiration of five-year period for assessment and collection of tax for 1917.

March 3, 1924, claim for refund of 1918 taxes filed.

August 20, 1924, claims in abatement for 1917 and 1918 rejected.

August 27, 1924, claim for refund of 1918 tax allowed in part.

January 7, 1925, part of an overpayment of 1918 tax applied as a credit against unpaid additional assessment for 1917.

July 14, 1928, claim for refund of a sum including the above credit filed. This claim was duly rejected.

March 27, 1929, suit brought.

The Court of Claims held that Section 611 of the Revenue Act of 1928 barred recovery. (R. 8.)

Since the same question is already before this Court in several pending cases, the United States does not oppose the granting of the writ of certiorari.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
LISLE A. SMITH,
BRADLEY B. GILMAN,
Attorneys.

SEPTEMBER, 1930.

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No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1930

BOSTON PRESSED METAL COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 337

BOSTON PRESSED METAL COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 8) is reported in 42 F. (2d) 312.

JURISDICTION

The judgment of the Court of Claims was rendered June 2, 1930. (R. 10.) Petition for certiorari was filed August 8, 1930. Certiorari was granted October 20, 1930. (R. 11.) Jurisdiction is conferred on this Court by Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The general question involved is: Where a tax is assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory time therefor had expired,

does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid?

If this question should be answered in the affirmative, this additional question is presented: Whether Section 611 should be construed to apply to a collection of a tax by a credit of an admitted overpayment by the taxpayer for another year.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 7–8.

STATEMENT

On March 30, 1918, the petitioner filed its income and excess profits tax return for the calendar year 1917 and during the same year paid the tax shown thereon. (R. 6.) On January 7, 1921, the Commissioner of Internal Revenue assessed an additional tax for the year 1917 in the amount of $6,277.77. On February 24, 1921, the petitioner filed a claim for the abatement of this amount and the abatement of an assessment for the year 1918. On January 7, 1925, the Commissioner acted on the claim in abatement and abated the assessment for 1918 in part and rejected the claim in abatement for 1917, and on the same date applied $3,844.94 of the amount theretofore paid for 1918 as a credit against the outstanding 1917 assessment. The five-year period for the collection of 1917 tax expired on March 30, 1923. The credit of the 1918 overpayment was thus made at a time when the period for the collection of 1917 tax had expired.

The taxpayer filed a claim for refund which was rejected. (R. 7.) Suit was instituted March 27, 1929. (R. 3.) The Government defended on the ground that the credit constituted a payment out of time, the recovery of which was barred by Section 611 of the Revenue Act of 1928.

SUMMARY OF ARGUMENT

The applicable provisions of the Revenue Acts require the Commissioner of Internal Revenue to apply determined overpayments as credits against unpaid assessments. The statute of limitations against collections applies to credits so made. Section 609 (b) of the Revenue Act of 1928 declares credits to be void if a payment at the particular time would be an overpayment, within the meaning of Section 607, which section authorizes refund of payments made out of time. But Section 611 is a limitation on Section 607. Whether the application of a credit is void under Section 609 (b) can be determined only by applying Section 611 as a limitation on Section 607.

ARGUMENT

In *Graham and Foster* v. *Goodcell*, No. 36, current term, the brief for respondent fully presents the question of the effect of Section 611 of the Revenue Act of 1928 (*infra*, *p.* 7). We contend that Section 611 operates to prevent recovery of taxes sued for in the instant case. The distinctions between that case and this are as follows:

(1) In that case the suit was against the Collector; here it is against the Government. (2) In that case

the claim in abatement was acted upon before collection was barred; here the action on the claim in abatement was delayed until the period for collection had expired. (3) In that case the suit was instituted prior to the enactment of the Revenue Act of 1928 and during the life of Section 1106 (a) of the Revenue Act of 1926; in this case it was instituted after the passage of the Revenue Act of 1928, which repealed Section 1106 (a). (4) In that case the tax was collected by a payment from the taxpayer to the Collector; in this case the collection was by the application of an overpayment for another year which was applied by the Commissioner as a credit against the unpaid assessment for the year involved.

The first three distinctions are all present in *Magee* v. *United States*, No. 65, current term, and they are discussed in the Government's brief in that case. The present case will be controlled by the decision in the *Magee* case unless the payment of the tax by a credit is a controlling distinction. The language of Sections 607, 609, and 611 affords no indication that Section 611 was not intended to apply to collections made by credits. The court below so construed the sections and held that Section 611, so construed, was constitutional.

The taxpayer in this case had overpaid its tax for the year 1918 and the Commissioner of Internal Revenue so found and declared. The Commissioner did not repay the sum here involved to the taxpayer but, pursuant to the power given him by the Revenue Act then in effect (Section 281, Revenue Act of 1924),

applied that sum in liquidation of an outstanding assessment for the year 1917. The taxpayer brought suit for the recovery of this sum on the ground that it had been determined by the Commissioner to be an overpayment for the year 1918. Application of a credit against an assessment at a time when collection is barred has been held to amount to an erroneous collection. *Peerless Paper Box Mfg. Co.* v. *Routzahn*, 22 F. (2d) 459 (N. D. Ohio). By Sections 607, 609, and 611 of the Revenue Act of 1928, Congress has established the status of such credits. Section 609 (a) of the Revenue Act of 1928 (*infra*, p. 7) provides "Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607." Section 607 of the Revenue Act of 1928 (*infra*, p. 7) provides that a tax paid after the period of limitations for collection shall be an overpayment and refunded to the taxpayer upon timely claim. But Section 611 of that Act (*infra*, p. 7) provides that a payment shall not be considered an overpayment under the provisions of Section 607 if claim in abatement was filed and collection stayed.

The application of the credit in the present case is not therefore void under Section 609 (a), as payment at that time would not have been an overpayment within the meaning of Section 607 as limited by Section 611. As the application of the credit was not void under Section 609 (a), it constitutes a payment coming within the operation of Section 611. These three sections, properly construed, evidence an intention on the part of Congress to treat collections

and credits of taxes out of time on the same basis. No decision contrary to our contention has come to our attention.

In *Graham and Foster* v. *Goodcell*, No. 36, present term, we have argued that Section 611 should be construed to prevent recovery of payments falling thereunder and that, so construed, it is constitutional. Section 611, construed to deny recovery for a credit made, would likewise be constitutional.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. AARON YOUNGQUIST,
CHARLES B. RUGG,
Assistant Attorneys General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
GEORGE H. FOSTER,
Attorney.

DECEMBER, 1930.

APPENDIX

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875 (U. S. C., Sup. III, Title 26, Secs. 2607, 2609, 2611), provides in part as follows:

> SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.
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> Sec. 609. ERRONEOUS CREDITS.—(*a*) Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.
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> (*b*) Credit of barred overpayment.—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.
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> (*c*) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this act.
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> SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period

of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

U. S. GOVERNMENT PRINTING OFFICE: 1930

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

Nos. 36, 104, 105, 323, 337, 463, 529, 565, 519.—October Term, 1930.

36	R. E. Graham and E. E. Foster, Copartners doing business under the firm name of Millie Francis Oil Company, Petitioners, *vs.* Rex B. Goodcell, former Collector of Internal Revenue, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
104	Oak Worsted Mills, Petitioner, *vs.* The United States	On Writ of Certiorari to the Court of Claims.
105	Taft Woolen Company, Petitioner, *vs.* The United States	On Writ of Certiorari to the Court of Claims.
323	Second National Bank of Saginaw, Trustee, Petitioner, *vs.* The United States	On Writ of Certiorari to the Court of Claims.
337	Boston Pressed Metal Company, Petitioner, *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
463	Daniel Reeves, Inc., Petitioner, *vs.* Charles W. Anderson, Individually and as Collector of Internal Revenue, etc.	On Writ of Certiorari to to the United States Circuit Court of Appeals for the Second Circuit.
529	Laura H. Jennings, as Executrix, etc., Petitioner, *vs.* Charles W. Anderson, Individually and as Collector of Internal Revenue, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
565	Wright & Taylor, Inc., Petitioners, *vs.* Robert H. Lucas, Collector of Internal Revenue, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
519	Eastern Equities Corporation, Petitioner, *vs.* The United States.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 26, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

These cases involve the question of the effect and validity of ection 611, which is to be read in connection with section 607,

of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 874, 875).[1]

No. 36, *Graham et al.* v. *Goodcell,* is typical of this group of cases. On March 22, 1918, petitioners filed their partnership income and excess-profits tax returns for the year 1917 and paid the taxes thereby shown to be due. Additional taxes were assessed by the Commissioner of Internal Revenue in January, 1920. The petitioners filed a claim for the abatement of this assessment on February 11, 1920, and the Commissioner rejected the claim on December 27, 1922. Under section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265), the five-year period for the collection of the taxes for 1917 expired on March 22, 1923. The Collector served notice and demand for payment on November 19, 1924, threatening distraint, and on November 29, 1924, and December 3, 1924, the petitioners paid the additional taxes under protest. On September 25, 1925, they filed a claim for refund upon the ground that the taxes were collected after the statute of limitations had run. The claim was rejected by the Commissioner on January 13, 1926, and this suit to recover the money paid was brought on December 23, 1927, in the District Court of the United States for the Southern District of California. The judgment entered in favor of the petitioners by the District Court was reversed by the Circuit Court of Appeals for the Ninth Circuit, 35 Fed. (2d) 586. This Court granted a writ of certiorari, 281 U. S. 708.

There are variations in the other cases, but the determining features are the same. A claim in abatement was filed and collec-

[1]These sections are as follows:

"Sec. 607. Effect of Expiration of Period of Limitation against United States. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

tion was delayed; the collection was made after the statute of limitations had run, and before the enactment of the Act of 1928. In some of the cases, the suit to recover the amount paid was brought after, and in other cases before, the Act of 1928 became a law on May 29, 1928. The suits were either in the Court of Claims against the United States, or in the District Courts of the United States against the Collector, either individually or officially, or in both capacities. In all these cases the decisions below were in favor of the Government[2] and writs of certiorari were issued by this Court.[3] The contentions presented are, in substance, that sections 607 and 611 of the Revenue Act of 1928 do not apply retroactively; that their provisions are not applicable to payments made under duress; that the stay contemplated by section 611 is not a mere voluntary delay in collecting the tax; that these sections were intended to control administrative action only and not to affect judicial proceedings; that section 611 should not be construed to apply to a personal action against the Collector to recover taxes illegally collected; that section 611 was repealed by the Act of May 29, 1928, c. 901, sec. 3, 45 Stat. 986, 996; that section 250 (d) of the Revenue Act of 1921 extinguished the liability for taxes upon the expiration of the five-year period specified; that the Congress having extinguished the liability had no power under the Fifth Amendment of the Constitution to revive it; and that, if section 611 is construed to authorize the collection of the tax in the circumstances shown, it further violates the Fifth Amendment because the statute is unreasonable and arbitrary.

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[2]Court of Claims: No. 104, Oak Worsted Mills v. United States, 36 Fed. (2d) 529, 38 Fed. (2d) 699; No. 105, Taft Woolen Co. v. United States, 38 Fed. (2d) 704; No. 323, Second National Bank of Saginaw v. United States, 40 Fed. (2d) 129; No. 337, Boston Pressed Metal Co. v. United States, 42 Fed. (2d) 312.

Circuit Court of Appeals for the Second Circuit: No. 463, Reeves v. Anderson, 43 Fed. (2d) 679; District Court, *sub nom.* Regis Coal Co. v. Bowers, 37 Fed. (2d) 373; No. 529, Jennings v. Anderson, 43 Fed. (2d) 683.

Circuit Court of Appeals for the Sixth Circuit: No. 565, Wright & Taylor, Inc. v. Lucas, not yet reported, District Court, 34 Fed. (2d) 328.

In No. 519, Eastern Equities Corporation v. United States, there had been no hearing in the Circuit Court of Appeals for the First Circuit when the writ of certiorari was granted; ~~and the opinion of the District Court, is not yet reported.~~

[3]281 U. S. 713, 717; ~~282 U. S.~~ post, pp. —

sub. nom. American Glue Co. vs. United States, 42 Fed. (2d) 235.

First. As to the construction of the statute. Section 607 provides that a tax assessed or paid after the expiration of the period of limitation applicable thereto shall be considered an "overpayment" and shall be credited or refunded to the taxpayer, if claim therefor is duly filed. Section 611 enacts a qualification by providing that in stated circumstances the payment of the tax shall not be considered an overpayment under the provisions of section 607. These circumstances are (a) an assessment of the tax within the time applicable thereto and before June 2, 1924, (b) the filing of a claim in abatement, (c) the stay of the collection of any part of the tax, and (d) the payment of such part of the tax before, or within one year after, the enactment of the Act of 1928.

The occasion for this legislation, and the general purpose of the Congress in enacting it, are apparent. The Revenue Act of 1918, by section 250 (d), (c. 18, 40 Stat. 1057, 1083) provided that "no suit or proceeding" for the collection of taxes should be begun "after the expiration of five years after the date when the return was due or was made." This provision applied only to taxes assessed under that Act. Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265) prescribed the same period of limitation for collection by suit or proceeding, and the provision was made applicable to the collection of taxes both under that Act and under prior income, excess-profits, or war-profits tax Acts, the five years running from the date of the filing of the return. The Treasury Department ruled that this limitation applied only to judicial proceedings and not to collection by distraint, the common method of enforcing payment.[4] Section 1106 (a) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 113) provided that the statute of limitations should "not only operate to bar the remedy" but should "extinguish the liability," but that "no credit or refund in respect of such tax" should be allowed unless the taxpayer had "overpaid the tax". In *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346 (decided February 21, 1927), this Court held that the period of limitation fixed by section 250 (d) of the Revenue Act of 1921 did apply to collection by distraint proceedings. It thus appeared that many of the

[4] I. T. 1446, Cumulative Bulletin I-2, July-December, 1922, p. 218. See Stange v. United States, decided January 5, 1931, 282 U. S. —.

collections theretofore made had been barred by the statute, and suits were brought to recover the moneys paid.[5] In many cases claims in abatement had been filed and proceedings for collection had been delayed until the claims had been acted upon, and thereupon the taxes had been collected despite the fact that the statute of limitations had run. Large amounts had been paid into the Treasury in this way, and it was the purpose of the Congress that payments made in the circumstances described in section 611 of the Revenue Act of 1928 should not be refunded.[6]

The petitioners urge that section 611, read in its relation to section 607, was intended to apply only prospectively, that is, to action to be taken by the Treasury Department on refund claims filed after the enactment of the Act. Stress is laid upon the language of section 607 that a payment made after the expiration of the period of limitation "shall be considered" an overpayment and "shall be credited or refunded" if claim therefor "is filed." But section 611 was manifestly intended to operate retroactively according to its terms. That is, it expressly applied to internal revenue taxes which had been assessed prior to June 2, 1924, and within the period of limitation applicable to the assessment. The section applied to taxes, so assessed, which had been paid before the enact-

[5]See Toxaway Mills v. United States, 61 C. Cls. 363, reversed on confession of error (March 12, 1927), 273 U. S. 781.

[6]Section 611 as it appeared in the bill introduced in the House of Representatives provided not only for the retention of the moneys paid, but also that, in similar circumstances, amounts not yet paid might be collected within a year after the new enactment. The Committee on Ways and Means in its report on the bill stated: "Sec. 611. Collections in Cases in which Claims in Abatement were filed. Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly,

ment of the Act of 1928, as well as to those which would be paid within one year thereafter. The provision was applicable to such payments although the period of limitation on assessment and collection had expired when the payments were made; and the provision of section 611 related to such payments only when a claim in abatement had been filed and collection had been stayed. The words of section 607 did apply to future action as to credits and refunds by requiring recognition of the right of the taxpayer, as stated in the section, to have a return of the moneys paid, but that right, under section 611, was not to exist when the payments had been made in the circumstances there described. It was the circumstances in which the tax had been paid, and not the time of filing the claim for a refund of the money, that section 611 made determinative; and it would be inconsistent with the plain intendment of that section to say that taxpayers should be denied a refund in those circumstances only where their claims for refund were made after the enactment, but not if they had been made before. The words of section 607, if a claim for refund "is filed within the period of limitation for filing such claim", established the appropriate condition that a claim for refund should be duly filed, but do not require the construction that the scheme of the statute, which embraced the important prohibition of section 611, should be limited to those cases where claims for refund should be filed after the statute was enacted.

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it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act. Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment." (70th Cong., 1st Sess., H. R. Rep. No. 2, p. 34.)

The Finance Committee of the Senate opposed the provision of section 611 (70th Cong., 1st Sess., Sen. Rep. 960, p. 42). In conference, an amendment was adopted (70th Cong., 1st Sess., H. R. Rep. No. 1882, pp. 6, 7, 22, 23), with the result that section 611 was enacted in its present form, that is, with the provision eliminated as to the collection of amounts not yet paid.

We are also of the opinion that the statute embraces involuntary payments. The argument of the petitioners points to the provision of section 611 which made it applicable not only to payments before the enactment but to those within one year thereafter. It is said that the latter must be voluntary payments, and that the Treasury Department so construed the statute, as the statute did not purport to authorize collections after the period of limitation had expired.[7] But the statute also applied to payments which had been made in the past. The concern of the Congress lay with the fact that payments had been made after the statute of limitations had run and with the particular situation of taxpayers where claims in abatement had been filed and the collection stayed. Section 611 was to prevent refunding the money if collection had thus been postponed. That situation existed where, after the expiration of the period of limitation, payment had been compelled, and the statute made no exception of such payments. The practice of collecting taxes by distraint, and the mistaken view of the law that the statute of limitations had not barred collection in that manner, had exposed the Treasury to demands which it was the intention of the legislation to defeat.

Petitioners contend that the stay to which section 611 referred was not simply a voluntary delay in enforcing payment. "Stay" is said to be a term of art, with a meaning opposed to a mere voluntary postponement of action. There would be much force in the point, if the word could be taken out of its particular setting. A "stay" compelled, rather than voluntarily granted, would be either under a judicial order or by virtue of statutory compulsion. Section 3224 of the Revised Statutes (U. S. C., Tit. 26, sec. 154) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". See *Graham* v. *du Pont*, 262 U. S. 234, 254, 255. Statutory provisions for stay of collection were limited in application. See Revenue Act of 1918, sec. 214 (a) (12) (a); sec. 234 (a) (14) (a). *United States* v. *Barth*, 279 U. S. 370.[8] There was no mandatory stay,

[7] Mimeograph 3360, July 27, 1928; Cumulative Bulletin VII-2, pp. 82, 85.

[8] See also Act of October 3, 1917, c. 63, sec. 205 (b), 40 Stat. 305; Revenue Act of 1924, c. 234, sec. 279 (a), 43 Stat. 300; Revenue Act of 1926, c. 27, sec. 279 (f), 44 Stat. 60; Revenue Act of 1928, c. 852, sec. 273 (f) (g) (h), 45 Stat. 855.

that is, in the absence of agreement, without bond. But section 611 expressly applies where a claim in abatement was filed "with or without bond." The word "stay" cannot therefore be taken to be limited to a mandatory stay. It is said, however, that the words "without bond" were inserted in order to include those cases where there was a contractual stay, as in cases where the Government had been protected by a deposit of money in escrow, or by a deposit in bank as a guarantee of payment, or by other forms of binding agreements, where bonds were not filed. Such cases were exceptional, and to confine the statute to such instances would be to limit it so narrowly as to ignore its apparent purpose. In the case of a taxpayer, believed to be solvent, who had filed a claim in abatement, the postponement of collection would normally take place without agreement. It is urged that if the statute is applied to voluntary delays, the clause as to stay is surplusage. If so, such a construction would be preferable to one that would make the statute virtually inoperative. But the clause is not inappropriate, as it is descriptive of the situation which followed the filing of the claim in abatement. It is true that the statutes and regulations relating to the filing of such claims did not require that there must be a postponement of collection pending decision. The collector was still put to his duty of due diligence, but he had authority to postpone the collection pending the determination of the claim, unless he believed that such action would jeopardize the ultimate recovery.[9] Such postponement, on the assumption that the statute or regulations did not bar proceedings for collection by distraint, created the situation to which section 611 was directed. The view that the word "stay" was intended to embrace this voluntary delay is supported by the statements in the reports of the committees in the House of Representatives and the Senate.[10]

In most of the cases now under review, it appears that the claim in abatement was rejected after the expiration of the period of limitation for collection. In No. 36, *Graham* v. *Goodcell*, however, the claim in abatement was rejected in December, 1922, and the period of limitation did not expire until March, 1923. It is urged

[9] R. S., section 3220; Treasury Department Regulations No. 14, Revised, p. 44; Regulations No. 33, Art. 261; Regulations No. 45, Art. 1032; Regulations No. 62, Art. 1032; Regulations No. 65, Art. 1281.

[10] See Note 6, *supra*.

that, for this reason, that case falls outside the purview of section 611. The statute makes no such exception, and we are not warranted in implying one. The claim in abatement had been filed and was pending for nearly three years. There is room for the inference that had it not been for this delay, the tax would have been collected before the statute ran. The tax was collected later and the statute, by its terms, is applicable.

It is further insisted on behalf of the petitioners that sections 607 and 611 relate solely to administrative action and not to judicial proceedings. In support of this argument, an elaborate analysis of the revenue acts is presented in order to establish the meaning of the statutory words "credit and refund" and "overpayment" and the aptness of their reference to administrative proceedings. It is not necessary to review this analysis, for there can be no doubt that these words do have appropriate reference to action in the course of administration. But it does not follow that by the use of these words the statute is limited to such action. There is no basis for the suggestion that there were questions involved of such a character as to make it appropriate to submit them to the exclusive judgment of the Commissioner.[11] The question was not as to the merits of the tax but simply as to the existence of certain facts of time and procedure. These facts were matters of record, easily ascertained and definite in character. It would be anomalous that the right of the taxpayer to obtain a refund from the Department, to which he was under obligation to resort (R. S. 3226, U. S. C. Tit. 26, sec. 156), should be denied, while the right to recover by suit the same amount under exactly the same circumstances should remain unaffected. In the attempt to explain this anomaly, it is said that the provision was inserted because of a distrust of administrative refunds.[12] But section 611 contains no exception as to judicial proceedings, and its prohibition is one which can be enforced appropriately by the courts when the taxpayer demands relief by suit. We are brought back to the fundamental purpose of the statute, and we are unable to conclude that it established one rule for the Department and another for the courts. We think that it was

[11]Compare Fong Yue Ting v. United States, 149 U. S. 698, 714, 715; United States v. Babcock, 250 U. S. 328, 331; Ex parte Bakelite Corporation, 279 U. S. 438, 452.

[12]See Revenue Act of 1928, sec. 710, 45 Stat., p. 882.

intended to prevent refunds in the circumstances stated and not merely a particular way of getting the money from the Treasury; that the effect of the provision was to deny a right to recover the amount paid and that the provision governs equally wherever the right is asserted.

In this view, it is not material whether the suit was brought by the taxpayer before or after section 611 was enacted. The validity of the statute with respect to its effect upon existing causes of action is a distinct question. So far as the construction of the statute is concerned, it is apparent that the mere pendency of the suit was not made a criterion of the right to recover. Nor is there any warrant for making a distinction in this respect between suits which had been brought against the collector individually and those pending against the United States.

There is also a contention that section 611 does not apply when the tax was paid by the credit of the amount of an overpayment for another taxable year. But the application of a credit against an assessment at a time when collection was barred must be regarded as an erroneous collection, and we see no reason for taking such a case out of the statute.

Second. As to the question of repeal. It is insisted that section 611 was repealed on the same day that it was enacted. This effect is ascribed to section 3 of the Act of May 29, 1928, c. 901, 45 Stat. 986, 996. That section amended section 3220 of the Revised Statutes which contained provisions as to the refunding of taxes erroneously or illegally collected. Section 3220 had been amended by section 1111 of the Revenue Act of 1926 (43 Stat. 115) so as to except the cases provided for in sections 284 and 319 of the latter Act, which placed limitations on credits and refunds. Section 619 (b) of the Revenue Act of 1928 (45 Stat. 878) amended section 3220 by striking out this exception and inserting in lieu thereof "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate and gift taxes". The amendment made by section 3 of chapter 901, of the Act of May 29, 1928 (45 Stat. 996) omitted this exception, and hence, it is contended, repealed section 611 of the Revenue Act of 1928. The Revenue Act was approved May 29, 1928, 8 A. M. (45 Stat. 883). The hour of the approval of chapter 901 of the same date does not appear. Section 3 of the latter Act does not expressly repeal sec-

tion 611 of the Revenue Act of 1928, and the question is whether there is repeal by implication. The familiar principle that repeal will not be implied unless there is a positive repugnancy between the provisions of the new law and those of the old, has most appropriate application, as stated by Mr. Justice Story, to the interpretation of laws for the collection of revenue (*Wood* v. *United States,* 16 Pet. 342, 363), and the presumption against such an intention to repeal is strongest when the two acts are passed not only at the same session but on the same day. *Beals* v. *Hale,* 4 How. 37, 53; *Rodgers* v. *United States,* 185 U. S. 83, 89.[13] In the present instance, there is no irreconcilable conflict between the two provisions. Section 611 established a special rule for a particular situation in order to embody a policy deliberately adopted by the Congress, and there is no ground for concluding that contemporaneously with that enactment the policy was abandoned and the enactment repealed. *Rodgers* v. *United States, supra; Washington* v. *Miller,* 235 U. S. 422, 428.

Third. As to the validity of section 611. This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached.[14] There is no question here as to the original liabilty of the taxpayers. The tax was a valid one, and the fact that the taxpayers had been indebted to the Government for the amount which was subsequently collected is not now open to dispute. Delay in collection had followed upon the taxpayers' request for a consideration of their claim that the tax should be abated, and, in the mistaken belief on the part of the administrative authorities that the stat-

[13]See also, Smith *v.* The People, 47 N. Y. 330, 339; City of Birmingham *v.* Southern Express Co., 164 Ala. 529, 538; McFarland *v.* The Bank, 4 Ark. 410, 417; Thompson *v.* Board of Supervisors, 111 Cal. 553, 556; Hope *v.* The Mayor, 72 Ga. 246, 251; Hutchinson *v.* Self, 153 Ill. 542, 549, 550; State *v.* Board of Commissioners, 177 Ind. 595, 691; Eckerson *v.* City of Des Moines, 137 Iowa 452, 489; Mayor *v.* German-American Fire Insurance Co., 132 Md. 380, 385; Commonwealth *v.* Huntley, 156 Mass. 236, 239; State *v.* Archibald, 43 Minn. 328, 330, 331; Walser *v.* Jordan, 124 N. C. 683, 687, 688; Commonwealth *v.* City of Pottsville, 246 Pa. 468; Town School District *v.* School District No. 2, 72 Vt. 451, 454, 455.

[14]See Nichols *v.* Coolidge, 274 U. S. 531; Blodgett *v.* Holden, 275 U. S. 142; Untermeyer *v.* Anderson, 276 U. S. 440; Cooper *v.* United States, 280 U. S. 409, 412. Compare Stockdale *v.* Insurance Companies, 20 Wall. 323, 331; Wagner *v.* Baltimore, 239 U. S. 207, 216, 217; Forbes Boat Line *v.* Board of Commissioners, 258 U. S. 338, 339.

ute of limitations did not bar collection by the appropriate proceeding of distraint, the delay had been continued until after the statute had run. On the discovery of the mistake, as pointed out by the decision of this Court, the Congress sought to prevent a refund of the amount thus collected. The question is whether these circumstances remove the case from the operation of the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed. *Steamship Company* v. *Joliffe*, 2 Wall. 450, 457, 458; *Ettor* v. *Tacoma*, 228 U. S. 148, 156; *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 340.

This rule is well illustrated by the case of *Forbes Boat Line* v. *Board of Commissioners, supra*, where the suit was brought to recover tolls unlawfully collected for passage through the lock of a State canal. The passage was free under the law as it stood at the time, and the subsequent legislation of the State which attempted to validate the illegal collection was held to be in violation of the Fourteenth Amendment. The Court said that the legislature in 1919 could not compel plaintiff to pay for a passage made in 1917 without promise of reward "any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls". But while the legislature could not in such a case retroactively create a liability, the court recognized that there is a class of cases in which defects in the administration of the law may be cured by subsequent legislation without encroaching upon constitutional right, although existing causes of action may thus be defeated.

In *United States* v. *Heinszen & Company*, 206 U. S. 370, it appeared that after the Philippine Islands had come under the military control of the United States, the President had issued an order establishing a system of tariff duties which were levied on goods coming into the Islands whether from the United States or other countries. The tariff was in force when the treaty of peace was ratified and was subsequently continued, with modifications. The President, as commander-in-chief, had authority to impose tariff duties prior to the ratification of the treaty, but not thereafter.[15] Accordingly, those who had been compelled to pay

[15] See De Lima v. Bidwell, 182 U. S. 1; Dooley v. United States, 182 U. S. 222; Dooley v. United States, 183 U. S. 151; Fourteen Diamond Rings, 183 U. S. 176.

such duties after the ratification, and before the Congress established the tariff, were entitled to recover the amounts paid.[16] Subsequently, the Congress passed an act purporting to ratify and confirm the collection of such duties. This Court upheld the statute, as against the claim under the Fifth Amendment, stating that the contention ignored the fact that when the goods were brought into the Philippine Islands, there was a tariff in existence under which duties were exacted in the name of the United States, and that Congress had power to ratify the collection. With respect to the effect of the act of Congress upon existing causes of action, the Court observed (*id.* p. 387) that "the mere commencement of the suit did not change the nature of the right" or "operate to deprive the government of the power to enact curative statutes, which, if the actions had not been brought would have been unquestionably valid."

Another illustration is found in *Tiaco* v. *Forbes*, 228 U. S. 549. Suits had been brought to make the Governor General of the Philippine Islands personally answerable in damages for the deportation of a Chinese person resident in the Philippines, and after the bringing of the suit the Philippine legislature had passed an act purporting to ratify the Governor General's action. Referring to the doubt that naturally would occur whether, if a right of action had vested previously, it could be taken away by such a statute, the court said that "it generally is recognized that in cases like the present, where the act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by a subsequent adoption of the act."

The doctrine of the *Heinszen* case, *supra*, was left unquestioned in *MacLeod* v. *United States*, 229 U. S. 416, 434, 435 (where the application of the Act of Congress with respect to Philippine duties was limited so as to carry out its true intent) and was definitely applied in the case of *Rafferty* v. *Smith, Bell & Company, Limited*, 257 U. S. 226, 232. Taxes on the value of exports from the Philippine Islands had been collected under a Philippine act while duties on such exports were forbidden by an act of Congress. The taxpayers had recovered judgments for restitution in

[16] Lincoln v. United States; Warner, Barnes and Company, Limited v. United States, 197 U. S. 419; 202 U. S. 484.

March, 1920. The Congress, by Act of June 5, 1920 (c. 253, 41 Stat. 1015, 1025), confirmed the collections. The Court held that the enactment was within the power of Congress, and the fact that the taxpayers had recovered judgments for the amounts collected gave them no higher rights than those possessed by the taxpayers in the *Heinszen* case. See also, *Charlotte Harbor & Northern Railway Company* v. *Welles,* 260 U. S. 8, 11, 12; *Hodges* v. *Snyder,* 261 U. S. 600, 603, 604. In *Forbes Boat Line* v. *Board of Commissioners, supra,* the *Heinszen* and *Rafferty* cases were invoked without success; the court expressed the view that "a tax may be imposed in respect of past benefits" and that in those cases the principle of ratification was not necessarily involved, citing *Wagner* v. *Baltimore,* 239 U. S. 207, 216, 217 and *Stockdale* v. *Atlantic Insurance Company,* 20 Wall. 323.

It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist.[17] "The power is necessary, that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration". *Charlotte Harbor & Northern Railway Com-*

[17]In United States v. Heinszen & Co., 206 U. S. 370, 386, 387, this Court said: "But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2, pp. 415, 416): 'The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. Goshen v. Stonington, 4 Connecticut 209; Wilkinson v. Leland, 2 Peters, 627; Langdon v. Strong, 2 Vermont, 234; Watson v. Mercer, 8 Peters, 88; 3 Story's Comm. on the Constitution, 267.'"

pany v. *Welles, supra.* This principle covers the present case. The petitioners had been indebted to the Government for the amount which was subsequently collected. They had asked for a review of the assessment and collection was postponed. The Treasury Department had mistakenly assumed that the statute of limitations did not apply to distraint proceedings and before the mistake was discovered the period of limitation had expired. The Congress could correct this defect in administration without violating any substantial equity, and this was accomplished by section 611 of the Revenue Act of 1928.

Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen & Company, supra,* at p. 391. The argument of the Government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal and not against the United States. *Sage* v. *United States,* 250 U. S. 33, 37; *Smietanka* v. *Indiana Steel Company,* 257 U. S. 1, 4, 5.[18] If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by

[18] "As the law stood before later statutes a collector was liable personally for duties mistakenly collected, if the person charged gave notice, at the time, of his intention to sue, and warning not to pay over the amount to the Treasury. Elliott v. Swartwout, 10 Pet. 137. But, after an act of Congress had required collectors to pay over such monies, it was held, against the dissent of Mr. Justice Story, that the personal liability was gone. Cary v. Curtis, 3 How. 236. Later statutes however recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to successors, as was held in this case, the formal defendant being saved from harm by the United States. This however is not the language of the statutes and hardly can be reconciled with the decision of this Court in Sage v. United States, 250 U. S. 33, and other cases to which we shall refer. . . . In Patton v. Brady, 184 U. S. 608, a suit against a collector begun after the passage of this statute, it was held that it could be revived against his executrix; which shows again that the action is personal; as also does the fact that the collector may be held liable for interest." Smietanka v. Indiana Steel Co., 257 U. S. 1, 4, 5.

denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 679, 680.

The objection to section 611 upon the ground that it is arbitrary and capricious in its classification, and hence offends the Fifth Amendment, is without merit. The broad discretion of the Congress in the exercise of its constitutional power as to taxation (*Brushaber* v. *Union Pacific Railway Company,* 240 U. S. 1, 24-26; *Evans* v. *Gore,* 253 U. S. 245, 256; *Barclay & Company* v. *Edwards,* 267 U. S. 442, 450) necessarily extends to the whole field of supervision and control of the processes of enforcement. It cannot be deemed to be unreasonable that the Congress in the present instance provided for cases in which a claim in abatement had been filed and the collection stayed. In its selection the Congress dealt with an appropriate class and was not bound to include others. Nor is the statute rendered invalid by the provision as to payments made within a year after its enactment. As already stated, the Treasury Department did not construe section 611 as authorizing collections in the future, after the expiration of the period of limitation;[19] and if the Congress saw fit to make the statute applicable to future voluntary payments, it was clearly entitled to fix a limit of time within which it might be so applied.

In some of the cases under review, it is insisted that section 611 does not preclude the recovery of interest, upon the ground that the interest had not been assessed and therefore lay outside the prohibition of the statute. But it does not appear that there was any statutory requirement that interest as such should be assessed, and the valid denial of the right to recover the principal should be deemed to apply also to the interest.

Judgments affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[19]See Note 7.